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THE OVERPRODUCTION OF DEATH

James S. Liebman*

In this Article, Professor Liebman concludes that trial actors have strong incentives to—and do—overproduce death sentences, condemning to death men and women who, under state substantive law, do not deserve that penalty. Because trial-level procedural rights do not weaken these incentives or constrain the overproduction that results, it falls to post-trial procedural review—which is ill-suited to the task and fails to feed back needed information to the trial level—to identify the many substantive mistakes made at capital trials. This system is difficult to reform because it benefits both pro-death penalty trial actors (who generate more death sentences than otherwise) and anti-death penalty lawyers (who concentrate their resources on post-trial review proceedings where, given high rates of trial error, they prevail abnormally often). Reforms that focus only on trials or appeals cannot solve the problem. Professor Liebman offers a comprehensive 10-part plan to adjust the skewed incentives and curb the overproduction of death.

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[W]e have constructed a [capital punishment] machine that is extremely expensive, chokes our legal institutions, visits repeated trauma on victims' families and ultimately produces nothing like the benefits we would expect from an effective system of capital punishment. This is surely the worst of all worlds.

— *Hon. Alex Kozinski & Sean Gallagher*¹

[W]ho chose this system?

— *Jordan Steiker*²

INTRODUCTION

This Article considers the relationship between substance and procedure in death penalty and habeas corpus law.³ Since the 1960s, a crucial

1. Alex Kozinski & Sean Gallagher, For an Honest Death Penalty, *N.Y. Times*, Mar. 8, 1995, at A21 [hereinafter Kozinski & Gallagher, *Honest Death Penalty*].

2. Jordan Steiker, Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism, 1998 U. Chi. Legal F. 315, 318 [hereinafter Steiker, *Excessive Proceduralism*].

3. Also exploring this relationship are, e.g., Joseph L. Hoffmann, Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty, 68 Ind. L.J. 817, 822, 831-34 (1993) (decrying the Supreme Court's "overconfidence in the value of procedures," including both death sentencing and habeas corpus procedures, to cure substantive defects in undeserved convictions and death sentences, and calling for a "frontal assault on the process

assumption has driven all efforts, however motivated, to reform capital punishment and habeas corpus law. According to that assumption, criminal procedural rights and substantive capital punishment have a zero-sum relationship: Expanding procedural rights—particularly the right to a post-conviction or habeas corpus procedure for enforcing other rights—frustrates the death penalty. Contracting criminal procedural rights—particularly habeas review—permits capital punishment to flourish.

This assumption appears to have considerable basis in fact. The abolition and procedural rights campaigns launched by the NAACP Legal Defense and Educational Fund (the "Fund") in the mid-1960s initially succeeded in securing enhanced procedural protections for capital and other criminal defendants. These protections indeed led, first, to a moratorium, and then, in 1972, to a ban on executions under pre-existing death penalty statutes. Even after many states began adopting new statutes in 1973, the Fund's continuing procedural successes coincided with the limitation of executions to none or only a few a year for a decade. But when the Supreme Court began scaling back the procedures for enforcing criminal procedural rights in the mid-1980s, the number of executions rose.

This Article, however, presents evidence revealing how thoroughly our actual system of capital punishment *belies* the traditional zero-sum assumption. In the guise of enforcing criminal procedural rights, our post-trial review processes in fact have come to play an essential role in the *substantive* determination of who lives and who dies. Trial-level actors drastically overproduce death sentences (two to six or more for every one the system means to carry out), foisting on post-trial courts the prodigiously expensive task, for which they are unsuited, of winnowing out the excess sentences. With little resistance from defense lawyers at trial, and with the unwitting connivance of the anti-death penalty bar thereafter,⁴ police, prosecutors, judges, and juries operate with strong incentives to generate as many death sentences as they can—reaping robust psychic, political, and professional rewards—while displacing the costs of their many consequent mistakes onto capital prisoners, post-trial review courts, victims, and the public.

In the wake of public outcry over both the length of the capital appeals process and the number of high-profile reversals of death sentences based on actual innocence and other serious trial errors, legislatures have begun contemplating reforms designed to correct this overproduction.

orientation of modern Eighth Amendment law"); Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 Sup. Ct. Rev. 65, 113–14 (urging the Court to expand habeas review of criminal cases in which there is a showing of actual innocence and to contract review in cases in which there is no issue of actual innocence); Steiker, *Excessive Proceduralism*, *supra* note 2, at 320 (proposing the elimination of "many of the purely procedural questions in federal habeas law"); *infra* note 261 (citing other sources).

4. I have been a member of that bar since 1979, when I began a six-year stint with the Fund.

But these reforms rarely attack the skewed incentive system that permits, and even encourages, the overproduction of death sentences. What is needed to curb this overproduction is a comprehensive and integrated set of reforms designed to realign the incentives and rationalize the system.

Part I of this Article reprises the evidence understood to establish a relationship between enhanced procedural rights and a less robust system of capital punishment. Part II looks beyond this superficial evidence and discovers a system in which an elaborate but overtaxed post-trial review process is substantively crucial because participants on both sides have conspired to reward trial-level actors for every death sentence they secure, including substantively erroneous ones, while failing to provide any meaningful constraints to counter the pull of those rewards. Part III examines existing reform efforts, contending that, alone, they cannot accomplish the much needed task of forcing trial-level actors to bear the costs of their mistakes. Part III concludes with a proposal to do just that, in the process requiring states to stand and answer the question "Who chose this system, and who will take responsibility for fixing it?"

I. PROCEDURAL RIGHTS AND THE DIFFERENCE DEATH MAKES

A. *More Procedures, Less Capital Punishment (1965–1983)*

In the mid-1960s, Fund lawyers devised a two-pronged litigation campaign to convince the Supreme Court to abolish the death penalty.⁵ The Fund modeled the first prong of its campaign, which directly pursued the judicial abolition of the death penalty, on the line of cases culminating in *Brown v. Board of Education*,⁶ in which the Fund convinced the Supreme Court to abolish state-mandated school segregation.⁷ Aware that the abolition campaign might fail in the short run, the Fund supplemented it with a second strategy that is less well-documented and is the focus of this section. This second part of the Fund's plan was aimed at expanding criminal procedural protections and liberalizing the habeas corpus process for enforcing those protections.⁸ The Fund modeled this part of its campaign on three separate lines of cases in which the Court had expanded criminal procedural rights in capital cases, leading immediately, or at least eventually, to their expansion in noncapital cases as well. As is described below, the second prong of the Fund's campaign was only partly designed to achieve some residual procedural benefit, in the event that the Fund's primary, substantively focused strategy failed. In addition, the second prong was designed to contribute to the penalty's medium-term demise if the primary strategy failed to succeed on its own in

5. See Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* 60–72 (1973).

6. 347 U.S. 483 (1954).

7. See Meltsner, *supra* note 5, at 7.

8. See *id.* at 15.

short order. Crucial to this approach was the assumption that additional procedures would eventuate in less capital punishment.

The first line of cases upon which the Fund built the procedural part of its strategy began with one of the earliest civil rights landmarks, the *Scottsboro Boys* case, in which the Court for the first time applied the Sixth through the Fourteenth Amendments to require states to afford indigent state criminal defendants a right to the adequate assistance of counsel, if "they stood in deadly peril of their lives."⁹ Once that capital-specific procedural reform was decreed, it was only a matter of time before the Court extended it (in two habeas cases) to *some*,¹⁰ then, in *Gideon v. Wainwright*, to *all* state felony defendants.¹¹ Motivating the initial step in this reform process was the Court's view that "death is different"—that "[t]he taking of life is irrevocable," so that "[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights."¹² This "solicitude for life" also had previously led the Court to adopt more exacting appellate review procedures in capital cases than in other criminal cases.¹³

A second line of precedent suggested that capital cases provided an attractive setting for the adoption of new procedural rights that would

9. *Powell v. Alabama*, 287 U.S. 45, 71 (1932); see also *Bute v. Illinois*, 333 U.S. 640, 676 (1948) ("[T]his Court repeatedly has held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process.").

10. See *Betts v. Brady*, 316 U.S. 455 (1942) (holding that the right to counsel in noncapital cases turns on case-by-case analysis of fundamental fairness).

11. 372 U.S. 335 (1963); see Meltsner, *supra* note 5, at 26.

12. *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter and Harlan, JJ., concurring). See also *Andres v. United States*, 333 U.S. 740, 752 (1948) ("In death cases doubts . . . should be resolved in favor of the accused."). In *Andres*, the Court extended the Sixth Amendment requirement of unanimous jury verdicts to the capital sentencing phase of federal capital trials. In *Reid*, the Court held that civilian dependents whom the military tried for capital crimes overseas deserved the protections of Article III and the Fifth and Sixth Amendments. Anticipating the *Powell-Gideon* progression, the Court three years later extended the same protections to *noncapital* defendants. See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

13. *Griffin v. United States*, 336 U.S. 704, 708 (1949) (holding that because the case was capital, the lower court was obliged to explain its reasons for affirming the denial of a motion to reopen a judgment of conviction based on newly discovered evidence). In *Williams v. Georgia*, 349 U.S. 375 (1955), the Court found inadequate a state procedural bar to Supreme Court review of a capital conviction imposed by a jury selected in a racially discriminatory manner. The same decision might not have been reached in a noncapital case:

The difference between capital and noncapital offenses is the basis of differentiation in law in diverse ways Fair regard . . . for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled.

Id. at 391.

apply from the outset to *all* state defendants. It thus was in two capital cases in 1936 that the Court for the first time invalidated state "convictions, which rest solely upon confessions shown to have been extorted by officers of the State by brutality and violence."¹⁴ Until relieved of the duty by lower federal courts on habeas, and then by the prophylaxis of *Miranda v. Arizona*¹⁵ (itself a collection of cases including one that was capital¹⁶), the Supreme Court applied its coerced confession rule in twenty-eight cases (by the Court's last count in 1959¹⁷), among which, twenty-one were capital.¹⁸ The reform impulse Fund lawyers hoped to harness in this regard was frankly described by Justice Jackson in one of the capital confession cases: "When the penalty is death, we . . . are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."¹⁹

A third set of cases showed that the fear of unreliable executions made especially salient to the Court the need not only for expanded procedural rights at state criminal trials but also to deputize the entire federal judiciary, on habeas, to assist the Court in enforcing those rights. Thus, the classic story of the writ's twentieth-century expansion²⁰ is in

14. *Brown v. Mississippi*, 297 U.S. 278, 279 (1936).

15. 384 U.S. 436 (1966).

16. See *People v. Stewart*, 400 P.2d 97 (Cal. 1965), *aff'd sub nom. Miranda*, 384 U.S. at 436.

17. See *Spano v. New York*, 360 U.S. 315, 321 n.2 (1959).

18. The 21 capital confession cases as of 1959 are: *Spano*, 360 U.S. at 315; *Crooker v. California*, 357 U.S. 433 (1958); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Thomas v. Arizona*, 356 U.S. 390 (1958); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Leyra v. Denno*, 347 U.S. 556 (1954); *Stein v. New York*, 346 U.S. 156 (1953); *Brown v. Allen*, 344 U.S. 443 (1953); *Stroble v. California*, 343 U.S. 181 (1952); *Johnson v. Pennsylvania*, 340 U.S. 881 (1950); *Harris v. South Carolina*, 338 U.S. 68 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Watts v. Indiana*, 338 U.S. 49 (1949); *Malinski v. New York*, 324 U.S. 401 (1945); *Lisenba v. California*, 314 U.S. 219 (1941); *Vernon v. Alabama*, 313 U.S. 547 (1941); *Lomax v. Texas*, 313 U.S. 544 (1941); *White v. Texas*, 310 U.S. 530 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown*, 297 U.S. at 278. Three of the eight latest of these confession cases (*Brown*, *Leyra*, and *Thomas*) are habeas cases.

19. *Stein*, 346 U.S. at 196. For other innovations adopted in capital cases, see *United States v. Jackson*, 390 U.S. 570 (1968) (limiting state's capacity to induce waivers of the right to trial); *Pate v. Robinson*, 383 U.S. 375 (1966) (requiring hearing to determine whether possibly incompetent defendant validly waived his right to a competency hearing); *Irvin v. Dowd*, 366 U.S. 717 (1961) (adopting procedural protections to keep pretrial publicity from biasing juries).

20. The classic discussion of the writ's expansion is Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963), followed in, e.g., *Wright v. West*, 505 U.S. 277, 285–86 (1992) (Thomas, J., concurring). As I have shown elsewhere, what in fact expanded was not (as Bator thought) the range of claims cognizable on habeas. Rather, what expanded was the frequency with which habeas was needed and used as a mechanism for federal review as of right once writ of error review as of right in the Supreme Court was replaced by discretionary certiorari review. See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2091–94 (1992).

essence a story of five cases "rais[ing] serious federal constitutional questions upon which the carrying out of *death sentences* depended"²¹—*Frank v. Mangum*,²² *Moore v. Dempsey*,²³ *Brown v. Allen*,²⁴ and the 1963 duo of *Fay v. Noia*²⁵ and *Townsend v. Sain*.²⁶

The Fund's short-term procedural reform program was not just a fortuitous byproduct of its long-term abolition campaign. Rather, the former was designed as a key mechanism for eventually achieving the success of the latter. Central to the Fund's abolition strategy was an assumption that enhanced procedures—including ones for enforcing other procedural rights—were the enemy of substantive capital punishment: As reliable procedures flourished, the death penalty would vanish. The idea was only partly to impel the Court to insist on a specialized set of reliable *capital sentencing* procedures that it then would discover (as the Fund argued in *Gregg v. Georgia*,²⁷ and as the Court itself had said in *McGautha v. California*²⁸) were "beyond present human ability."²⁹ Also at work was the belief that cheap and unreliable criminal procedures, at both the guilt and sentencing phases, were crucial to the ability of capital sentencing jurisdictions—for the most part, counties with a limited ability to pay their way in criminal cases—to make economical use of that penalty.³⁰

21. *Brown v. Allen*, 344 U.S. 443, 447 (1953) (emphasis added).

22. 237 U.S. 309 (1915) (reviewing capital conviction and death sentence of Leo Frank).

23. 261 U.S. 86 (1923) (reviewing death sentences of five African American men charged with killing a member of a white mob that had attacked a church the condemned men were defending).

24. 344 U.S. at 443 (reviewing, inter alia, the validity of confessions that formed the basis for three capital convictions).

25. 372 U.S. 391 (1963) (holding that the failure of a prisoner serving a life sentence to appeal his conviction to the state's high court—although otherwise preclusive of federal habeas review of his meritorious coerced confession claim—was excused because appealing would have made him eligible for a death sentence on retrial).

26. 372 U.S. 293 (1963) (reviewing capitally sentenced inmate's coerced confession claim). Capital punishment and expanded federal habeas also played a role in broadening rights to *state* procedures for reviewing criminal procedures. See *Case v. Nebraska*, 381 U.S. 336, 337–38 (1965) (per curiam) (Clark, J., concurring) (tracing to Court's habeas/exhaustion decision in *Young v. Ragen*, 337 U.S. 235, 238–39 (1949), an incipient right to adequate state post-conviction procedures). Compare *Griffin v. Illinois*, 351 U.S. 12, 13, 20 (1956) (ordering Illinois, which previously had afforded indigent criminal appellants a right to transcripts at state expense only in capital cases, to provide such transcripts in all criminal cases) with *id.* at 21 (Frankfurter, J., concurring) ("Since capital offenses are *sui generis*, a State may take account of the irrevocability of death by allowing appeals in capital cases and not in others.").

27. 428 U.S. 153, 198–202 (1976).

28. 402 U.S. 183, 204 (1971).

29. *Id.* The *McGautha* Court concluded that the Due Process Clause does not regulate capital sentencing procedures, *id.*, a view the Court has now spent nearly 30 years disavowing.

30. See Meltsner, *supra* note 5, at 66 (explaining that "[l]itigation over procedural rights would force the states [in] to extended judicial proceedings in order to make a death sentence stick").

Boykin v. Alabama,³¹ the case in which the Fund lawyers unveiled their abolition campaign, dramatically confirmed the campaign's procedurally reformative potential. *Boykin* is, of course, a central document of the Criminal Procedure Revolution. But few will recall that it began as primarily a *capital* case. The questions presented were (1) whether the death penalty, at least for the nonhomicidal offense of robbery, constituted cruel and unusual punishment, and (2) whether a guilty plea in a capital case was an intelligent and voluntary confession of guilt and waiver of the right to trial absent notice that, among other things, the plea could result in a death sentence.³² Without mentioning a Fund amicus curiae brief arguing, for the first time, that death was a cruel and unusual penalty per se,³³ the Court focused on the guilty plea. In so doing, however, it not only adopted an important new constitutional right (to explicit warnings about, and to waivers of, a variety of trial rights before pleading guilty), but it also extended that right to noncapital, as well as capital, cases.

Due to the initial success of the Fund's abolition strategy in the run-up to and in *Furman v. Georgia*,³⁴ there were few capital direct appeals and no capital habeas cases in the Court in the 1970s in which to pursue a strategy of capital-case incubation of procedural rights.³⁵ In the early 1980s, however, the Court (mimicking its involuntary confession jurisprudence) did use a few capital (usually habeas) cases to recognize new generally applicable rights,³⁶ and (on the model of the right-to-counsel

31. 395 U.S. 238 (1969).

32. See *id.* at 241-42.

33. See Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as Amici Curiae at 24-61, *Boykin v. Alabama*, 395 U.S. 238 (1969) (No. 642).

34. 408 U.S. 238 (1972) (per curiam) (invalidating all extant capital sentences and statutes); see Meltsner, *supra* note 5, at 106-07 (discussing the "logjam" of cases resulting from the Fund's successful moratorium strategy).

35. The first post-*Furman* capital habeas case to reach the Court on (unsuccessful) petition for review was *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), cert. denied sub nom. *Spenkelink v. Wainwright*, 440 U.S. 976 (1979), stay denied, 442 U.S. 901 (1979). The first such case that the Court reviewed was *Estelle v. Smith*, 451 U.S. 454 (1981) (discussed *infra* note 37).

36. In three post-1972 capital cases (two of them on habeas), the Court recognized important new procedural rights applicable across the board: *Francis v. Franklin*, 471 U.S. 307, 307-08 (1985) (barring use of mandatory rebuttable presumption instructions on elements of the crime; habeas case); *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985) (expanding modestly the "nonindependent state ground" exception to the procedural default bar to federal review of state criminal judgments and recognizing right of all indigent criminal defendants to assistance of state-funded psychiatric experts as long as mental disorder arguably figured in the criminal conduct); *Strickland v. Washington*, 466 U.S. 668, 669-70 (1984) (holding that (1) the exhaustion bar to habeas review is not jurisdictional and can be waived or defaulted by the state; (2) the right to counsel includes the right to a competent lawyer; and (3) the standard for assessing competence is stricter than the "farce and mockery" and other similarly forgiving standards in use in some lower courts). See also *Witherspoon v. Illinois*, 391 U.S. 510, 510-11 (1968) (rejecting invitations to abolish capital punishment and to forbid "death qualification" of jurors, but forbidding

cases) did insist on several procedures in capital cases that it did not initially demand across the board.³⁷ To justify these actions, the Court reiterated that “the penalty of death is qualitatively different from a sentence of imprisonment, however long,”³⁸ so “[it] is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”³⁹ And, indeed, expanded procedural rights coincided with reduced capital punishment: Between 1966 and 1978, no involuntary executions occurred; between 1978 and 1983, only seven did.

B. Fewer Procedures, More Capital Punishment (1984–2000)

Since approximately 1983 or 1984, however, the Court has (1) stopped using capital direct appeal cases as a forum for considering the existence of newly proffered procedural rights—except in rare instances

states to use scruples against the death penalty as a sufficient reason to excuse jurors for cause). For later cases in this same vein, see *infra* note 40.

37. Guilt-phase and guilt-focused cases include: *Herrera v. Collins*, 506 U.S. 390 (1993) (rejecting newly discovered evidence as grounds for habeas relief from convictions, but implying right not to be executed when demonstrably innocent); *Turner v. Murray*, 476 U.S. 28 (1986) (giving capital habeas petitioners a right to question prospective jurors about racial biases, though noncapital defendants have no such right); *Beck v. Alabama*, 447 U.S. 625 (1980) (giving only capital defendants a right to an instruction on viable lesser included offenses). Sentence-phase cases include: *Mills v. Maryland*, 486 U.S. 367 (1988) (recognizing right to benefit of nonunanimous jury decision on mitigating circumstances); *Ford v. Wainwright*, 477 U.S. 399 (1986) (barring execution of death sentence when prisoner is insane); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (applying stricter standard for assessing validity of prosecutorial closing arguments in capital cases under Due Process Clause than applies in noncapital cases); *Estelle*, 451 U.S. at 454 (ruling in habeas case that Fifth Amendment privilege against self-incrimination and *Miranda* rule apply to capital sentencing proceedings); *Bullington v. Missouri*, 451 U.S. 430 (1981) (extending double jeopardy protection to capital sentencing decision); *Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*) (enforcing right to present defensive evidence at sentencing phase); *Presnell v. Georgia*, 439 U.S. 14 (1978) (*per curiam*) (enforcing due process protection against affirmance of sentence on basis different from one on which jury relied in imposing it); *Lockett v. Ohio*, 438 U.S. 586 (1978) (establishing right, previously denied in noncapital cases, to present mitigating evidence); *Gardner v. Florida*, 430 U.S. 349 (1977) (establishing right, previously denied in noncapital cases, to disclosure of presentence report); *Gregg v. Georgia*, 428 U.S. 153 (1976) (implicitly recognizing right to bifurcation of guilt and capital sentencing phases); see also *Murray v. Giarratano*, 492 U.S. 1 (1989) (majority of Justices in separate opinions implying a limited due process right to effective counsel in capital, though not in noncapital, state post-conviction proceedings).

38. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

39. *Gardner*, 430 U.S. at 358 (plurality opinion). See, e.g., *Ford*, 477 U.S. at 411 (plurality opinion) (“In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.”); *Ake*, 470 U.S. at 87 (Burger, C.J., concurring in judgment) (“In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.”); *California v. Ramos*, 463 U.S. 992, 998–99 & n.9 (1983) (“The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”).

when it uses them to *deny* such rights;⁴⁰ (2) adopted a “nonretroactivity” doctrine forbidding federal courts (itself included) to declare new “procedural” rights in habeas cases;⁴¹ (3) repeatedly declined to adopt new due process or habeas rights in capital cases that do not already apply in noncapital cases;⁴² and (4) frequently refused to extend to noncapital cases the due process rights it had applied to capital cases in the late 1970s and early 1980s.⁴³ Worse, the Court has used the grisly facts and

40. See, e.g., *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (holding that due process is not offended if less than all jurors agree on whether murder was premeditated or committed in course of a specified felony, as long as all agree that one or the other version of first-degree murder was committed); *Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991) (ruling that criminal defendants do not have a constitutional right to explore the content of information about the case that prospective jurors acknowledge having learned from the press). The Court has modestly expanded procedural rights in several recent capital cases, most of which have been habeas cases. See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (plurality opinion) (holding in capital case that nontestifying “accomplices” [against-penal-interest] confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence,” hence cannot be admitted against the defendant; direct review case); *Bracy v. Gramley*, 520 U.S. 899, 904–10 (1997) (expanding modestly habeas petitioners’ right to discovery); *Kyles v. Whitley*, 514 U.S. 419, 422, 441–54 (1995) (granting certiorari explicitly because habeas petitioner was under sentence of death and expanding right to prosecutorial disclosure of exculpatory evidence to include evidence revealing the foibles of the state’s investigation); *Schlup v. Delo*, 513 U.S. 298, 298 (1995) (expanding slightly the still very narrow “innocence” exception to rules barring successive habeas review); *Amadeo v. Zant*, 486 U.S. 214, 215–16 (1988) (holding that prosecutor’s failure to make public his instructions to the jury commissioner to underrepresent African Americans on the jury venire provided “cause” for the habeas petitioner’s failure to make a jury challenge in a timely manner).

41. See *Teague v. Lane*, 489 U.S. 288, 299–316 (1989). Cf. *Bousely v. United States*, 523 U.S. 614, 620 (1998) (noting that *Teague* doctrine is limited to declaration of procedural, as opposed to substantive, rights).

42. See, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281–82 (1998) (concluding that no more process is due in capital clemency proceedings than the minimal amount that suffices in noncapital cases); *Herrera*, 506 U.S. at 405 (“[W]e have refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus.” (quoting *Murray*, 492 U.S. at 9)); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.6, at 102 n.15, 105 n.16 (3d ed. 1998) (citing other decisions).

43. See, e.g., *Monge v. California*, 524 U.S. 721, 722 (1998) (holding that the Double Jeopardy Clause, which the Court has found applicable in the capital sentencing context, see *Bullington v. Missouri*, 451 U.S. 430 (1981), does not extend to noncapital sentencing proceedings); *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) (holding that the standard for reviewing claim that ambiguous jury instructions impermissibly restricted the jury’s consideration of “constitutionally relevant evidence,” which the Court developed in a capital case, *Boyde v. California*, 494 U.S. 370 (1990), and in which context the Court has “held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case,” does not apply “[o]utside of the capital context”); *Harmelin v. Michigan*, 501 U.S. 957, 994–96 (1991) (ruling that Eighth Amendment rights to proportionality between crime and sentence and to individualized sentencing, which were extended to capital defendants in, e.g., *Woodson*, 428 U.S. at 289–90, do not apply to noncapital sentencing); *Mu’Min*, 500 U.S. at 423 (reaffirming rule of *Ristiano v. Ross*, 424 U.S. 589 (1976), that capital defendant’s right recognized in

convoluted procedural histories of single or sets of capital cases as a reason to interpret nearly out of existence a number of rights that it previously had extended to criminal cases generally—gutting the right to the effective assistance of counsel;⁴⁴ for the first time imposing a harmless error defense to the use of involuntary confessions;⁴⁵ making procedural defaults in prior state and federal proceedings a nearly impenetrable barrier to habeas review of noncapital as well as capital judgments, in the process, overruling a Warren Court mainstay, *Fay v. Noia*;⁴⁶ and broadly defining the new rules that cannot be applied on habeas to include any rule requiring even a minuscule accretion to previously recognized precedents.⁴⁷ Since the 1980s, that is, capital cases have been in the vanguard

Turner v. Murray, 476 U.S. 28 (1986), “to question prospective jurors as to racial prejudice in every case where the races of the defendant and the victim differ” does not apply to noncapital cases). But see Mitchell v. United States, 526 U.S. 314, 326 (1999) (extending to noncapital sentencing proceedings the rule of Estelle v. Smith, 451 U.S. 454, 463 (1981), that the Fifth Amendment privilege against self-incrimination applies to capital sentencing proceedings).

44. See Lockhart v. Fretwell, 506 U.S. 364, 364 (1993) (holding that counsel’s failure to raise then meritorious objection in capital case did not meet standard of prejudice established in *Strickland*); Burger v. Kemp, 483 U.S. 776, 776 (1987) (ruling that defendant in capital case whose attorney assisted in the defense of a co-indictee is not entitled to habeas on conflict-of-interest grounds or based on incomplete pretrial investigation); *Strickland v. Washington*, 466 U.S. 668, 687–700 (1984) (concluding that counsel’s failure to investigate character witnesses and secure psychiatric testimony is not sufficiently prejudicial to merit reversal); see also *Strickler v. Greene*, 527 U.S. 263, 289–96 (1999) (narrowly construing the prejudice and materiality concepts that are prerequisites for findings of ineffective assistance of counsel and prosecutorial suppression of evidence); *Boyd*, 494 U.S. at 378–80 (adopting a rule making it more difficult to demonstrate that the jury understood ambiguous instructions to have an unconstitutional meaning than the rule the Court previously had adopted in the noncapital case of *Sandstrom v. Montana*, 442 U.S. 510, 517–19 (1979)).

45. See *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991).

46. 372 U.S. 391 (1963). See *Sawyer v. Whitley*, 505 U.S. 333, 338–40 (1992) (holding that failure to raise claims in earlier federal habeas petition bars defendant who does not meet “actual innocence exception” from raising claims in later habeas proceeding); *Coleman v. Thompson*, 501 U.S. 722, 722 (1991) (overruling *Fay* in part and barring federal habeas review of claims that prisoner did not raise at trial or on direct appeal and presented for first time in state habeas petition); *McCleskey v. Zant*, 499 U.S. 467, 467 (1991) (treating prisoner’s failure to raise claim during initial habeas proceeding as barring relief based on the claim in subsequent habeas proceeding); *Dugger v. Adams*, 489 U.S. 401, 402 (1989) (holding that failure to object at state trial or to appeal based on incorrect jury instruction bars prisoner from raising issue in later federal habeas proceeding); *Smith v. Murray*, 477 U.S. 527, 527 (1986) (holding that defendant’s failure to appeal unconstitutional admission of psychiatrist’s testimony to Virginia Supreme Court bars federal habeas relief from that violation); see also Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679, 690–95 (1990) (describing the deleterious consequences of Supreme Court’s highly preclusive procedural default rules denying habeas relief to capital petitioners whose inadequate trial and appellate counsel were responsible for the procedural default).

47. See *Breard v. Green*, 523 U.S. 371, 375–76 (1998) (per curiam) (barring habeas relief based on state’s violation of Vienna Convention in part because enforcing that treaty

of the *destruction* of procedural protections and procedural review, for capital as well as noncapital defendants.

In taking these steps, the Court has frequently "mix[ed] discussions of the substance of condemned inmates' federal constitutional claims with recitations of the numbers of courts to which the claims have previously been presented without success, or of the length of time during which post-conviction proceedings have been pending,"⁴⁸ suggesting, as Justice Blackmun lamented, that the Court's "impatience with" capital proceedings supplies an independent basis for *denying* claims raised in that setting.⁴⁹ And in a cruel twist of the "death is different" logic,⁵⁰ the

right might require adoption of a "new rule"); *O'Dell v. Netherland*, 521 U.S. 151, 156–68 (1997) (denying prisoner habeas relief under recent Supreme Court decision, which allowed capital defendants to respond to state's claim of future dangerousness by showing that they would be parole-ineligible if not sentenced to die, because Court's decision qualified as a new rule); *Lambrix v. Singletary*, 520 U.S. 518, 527–39 (1997) (barring habeas relief based on improper instruction because legal principles relied on to invalidate instruction were not "*dictated* by precedent" within meaning of *Teague*); *Gray v. Netherland*, 518 U.S. 152, 166–70 (1996) (barring relief on claim that would require announcement of a new rule); *Graham v. Collins*, 506 U.S. 461, 466–78 (1993) (holding that claim is not a valid basis for habeas relief because it would require announcement of a "new rule" not "dictated" by existing precedent within the meaning of *Teague*); *Sawyer v. Smith*, 497 U.S. 227, 227 (1990) (denying relief under decision barring particular prosecutorial argument in favor of death penalty because decision announced a new rule); *Saffle v. Parks*, 494 U.S. 484, 491 (1990) (forbidding habeas relief based on claim that anti-sympathy instruction given in Oklahoma capital case "unconstitutionally limited the manner in which . . . mitigating evidence may be considered" because relief was not dictated by prior decisions invalidating instructions that "altogether prevented" jury from considering evidence); *Butler v. McKellar*, 494 U.S. 407, 407 (1990) (withholding relief under a recent decision, notwithstanding that it was directly controlling, because decision qualified as a new rule); cf. *Lockhart*, 506 U.S. at 368–73 (holding that *Teague* rule does not bar *state* from taking advantage of new rule of law that deprives prisoner of relief to which he would have been entitled at time of trial and direct appeal, and on that basis rejecting ineffective assistance of counsel claim premised on lawyer's failure to make objection under preexisting rule of law, even though there was a reasonable probability that such an objection would have avoided a death sentence at the time). But cf. *Stringer v. Black*, 503 U.S. 222, 227–37 (1992) and *Penry v. Lynaugh*, 492 U.S. 302, 314–15 (1989) (capital cases in which Court held that very modest accretions to rule in question were not "new"). Two-thirds of the Court's *Teague* cases have been capital. As these cases and those cited in *supra* notes 40 and 44–46 suggest, capital cases have frequently supplied the Court with the occasion for cutting back on procedures used to enforce other procedural rights. Cf. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2470 (1996) (noting that Rehnquist Court has narrowed criminal procedural rights, not by limiting the rights themselves but by limiting the procedures for enforcing those rights).

48. Anthony G. Amsterdam, *In Favour of Mortis*: The Supreme Court and Capital Punishment, *Hum. Rts.*, Winter 1987, at 14, 56; see, e.g., *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (stating that capital habeas petitioner's claim of constitutional right not to be convicted and condemned when innocent "must be evaluated in the light of the previous proceedings in this case, which have stretched over a span of 10 years"); Amsterdam, *supra*, at 60 & n.90 (collecting other examples).

49. *Darden v. Wainwright*, 477 U.S. 168, 204 (1986) (Blackmun, J., dissenting). See also *Dobbert v. Wainwright*, 468 U.S. 1231, 1238 (1984) (Brennan, J., dissenting from

Court has validated especially *truncated* procedures in capital cases (and, most especially, capital habeas corpus cases), designed pursuant to a policy, in Professor Amsterdam's phrase, "*in favorem mortis*."⁵¹ As a result of these capital-specific procedures, condemned prisoners are denied rights that could not constitutionally be withheld from "any other federal appellant—say, for example, a civil appellant claiming that he was overcharged by five dollars in federal income taxes, or underpaid by two dollars in social security benefits."⁵²

denial of stay of execution) (attributing denial of stay of execution, which would have permitted possibly innocent defendant to litigate witness-perjury claim, to courts' "impatience" with the fact, noted by lower court judge in opinion denying stay, that "[t]his case has been pending for a longer period of time than this nation was involved in World War II and the Korean War combined") (citation omitted).

50. See *supra* notes 12–13, 19, 26 and accompanying text.

51. Amsterdam, *supra* note 48, at 14. See, e.g., *Sawyer*, 505 U.S. at 341 & n.7 (interpreting exception to bar to successive petitions especially narrowly because of the susceptibility of such petitions to "last minute" filings designed to delay executions); *Gomez v. United States Dist. Ct.*, 503 U.S. 653, 654 (1992) (*per curiam*) (inviting federal courts to resolve doubts and uncertainties as to the merits of habeas petitions *against* capital petitioners when their filings come at the last minute in the face of an impending execution); *In re Blodgett*, 502 U.S. 236, 240 (1992) (*per curiam*) ("The delay in this case demonstrates the necessity for the rule that we now make explicit [which gives federal courts granting stays of execution] the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter . . ."); *Penry*, 492 U.S. at 313–14 (deciding to forgo notice to parties and briefing before extending rule of *Teague v. Lane*, 489 U.S. 288 (1989), to capital cases, because adherence to the Court's standard procedures might "delay the enforcement of the judgment"); see also *Schiro v. Indiana*, 493 U.S. 910, 914 (1989) (Stevens, J., concurring in denial of certiorari) (suggesting that Court may have denied certiorari in capital case raising substantial constitutional claims due to concerns about delay: "The long delay. . . in this case is a matter of public concern and. . . is relevant to any consideration of the efficacy of capital punishment. . . . [but] is manifestly not relevant to, and should have no impact on, petitioner's entitlement to consideration of his substantial federal claims by the federal courts."). Compare *Coleman v. Balkcom*, 451 U.S. 949, 958, 963 (1981) (Rehnquist, J., dissenting from denial of certiorari) (encouraging Court, in order to take "some responsibility for this mockery of our criminal justice system" caused by "endlessly drawn out legal proceedings" in capital cases, to adopt a policy of granting certiorari to review all capital direct appeal and state post-conviction petitions in order to "deny" relief, thereby expediting executions by precluding (on *res judicata* grounds, see 28 U.S.C. § 2244(c)(1994)) all subsequent federal habeas review) with *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985) (granting habeas relief based on egregious juror bias to same petitioner to whom, and in later stage of same case in which, then-Justice Rehnquist had sought peremptorily to deny relief and subsequent habeas review in order to expedite the proceedings).

52. Amsterdam, *supra* note 48, at 53–54 (discussing *Barefoot v. Estelle*, 463 U.S. 880 (1983)). For further discussion of the detrimental effect on capital habeas review of a regime of expedited and truncated review like that imposed by *Barefoot*, see James E. Coleman, Jr., *Litigating at the Speed of Light: Postconviction Proceedings Under a Death Warrant*, 16 Litig. 14, 52–53 (1990); William S. Geimer, *Death at any Cost: A Critique of the Supreme Court's Recent Retreat from Its Death Penalty Standards*, 12 Fla. St. U. L. Rev. 737, 760–66 (1985); Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1129, 1187, 1205–08 (1984); Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 343–45; Julia E. Boaz, Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal*

The best evidence that capital cases have been the death knell of procedural rights is the aptly named Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁵³ That act has little to do with terrorism and nothing to do with the substantive standards for imposing the death penalty, but everything to do with dismantling criminal procedural protections by attacking the main forum for enforcing them—habeas corpus—especially in capital cases. A centerpiece of AEDPA is a set of “Special Habeas Corpus Procedures in Capital Cases”⁵⁴ that make a death sentence a prerequisite for *diminished* procedural review,⁵⁵ including a maximum of 180 days to file a certiorari, state post-conviction, and a federal habeas petition.⁵⁶ To see how death now is “Special,” compare the roughly *sixty days* AEDPA gives newly assigned lawyers⁵⁷ to file each of these three actions—the first requiring a fine-tooth combing of the record for “new law” claims that cannot thereafter be raised;⁵⁸ the others requiring a detailed factual as well as legal investigation and fact, not notice, pleading⁵⁹—to the *ninety-day* limit⁶⁰ on noncapital certiorari petitions, the *one-year* or longer limit on most noncapital state post-conviction petitions,⁶¹ and the *365 days* AEDPA gives noncapital petitioners to prepare just the latter two proceedings.⁶² A death sentence also sometimes triggers a ban on post-answer amendment of petitions, an expanded default rule, and strict time limits on district court and court of appeals deliberations.⁶³

Despite its crude linkage of terrorism and capital prisoners’ pursuit of habeas relief, and the use of death sentences to trigger diminished review, AEDPA does its worst damage to procedural rights in the 99%-plus of habeas cases that do *not* qualify for “special” capital procedures.⁶⁴

Courts, 95 Yale L.J. 349, 349–55 (1985).

53. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 28 U.S.C.).

54. 28 U.S.C. §§ 2261–2266 (Supp. IV 1998).

55. See *id.*

56. See *id.* § 2263. The time limit is tolled while the certiorari and state post-conviction petitions are resolved.

57. *Id.* § 2261(d) (requiring appointment of new counsel after direct appeal).

58. See *supra* note 41 and accompanying text.

59. See 1 Liebman & Hertz, *supra* note 42, §§ 7.1(a), 11.2, 11.3, 11.7.

60. See 28 U.S.C. § 2101(c) (1994); Sup. Ct. R. 13.

61. See, e.g., Tenn. Code Ann. § 40-30-202 (1997).

62. See 28 U.S.C. § 2244(d) (Supp. IV 1998).

63. See *id.* §§ 2264(a), 2266(b)(1)(A), 2266(b)(3)(B), 2266(c)(1)(A).

64. Approximately 10,000 petitions are filed each year. See Roger A. Hanson & Henry W.K. Daley, U.S. Dep’t of Justice, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 2 (1995) (“For the past several years, the number of habeas corpus petitions filed in the Nation’s federal district courts has equaled or slightly exceeded 10,000 cases.”). Of these, fewer than 200 are capital. In fact, most capital cases are reviewed under AEDPA’s general provisions, which are so draconian that states have not thought it worth the extra resources to qualify for the “special” capital provisions. See 1 Liebman & Hertz, *supra* note 42, § 3.3b; Henry Weinstein, *Faster Death Penalty Appeals Rejected*, L.A. Times, Jan. 25, 2000, at A3 [hereinafter Weinstein, *Faster Appeals*] (“So far,

Consider that by all objective accounts—e.g., that of Chief Judge Richard Posner—noncapital habeas and section 2255 procedures were working well by the early 1990s, with per capita filings down by two-thirds since 1970.⁶⁵ Despite this salutary situation, Congress used the occasion of making the “Death Penalty” more “Effective” to revamp habeas and section 2255 generally—imposing a statute of limitations,⁶⁶ barring hearings on facts not presented in state court absent a convincing showing of innocence,⁶⁷ abandoning de novo review of legal and mixed legal-factual issues,⁶⁸ banning successive litigation of any claim previously included in, and nearly all claims omitted from, a prior habeas or section 2255 action,⁶⁹ and forbidding federal prisoner appeals except upon certification that they raise substantial constitutional issues notwithstanding that many such appeals feature federal statutory claims.⁷⁰ AEDPA in fact has provided a mini-boon to capital prisoners, who are represented by counsel and thus are better able to exploit the Act’s “pig’s ear” quality of drafting.⁷¹ Of the Court’s nine initial forays into the Act,⁷² six occurred in capital cases, and most accepted the prisoner’s view of the Act.⁷³ Where

no state has been deemed qualified by a court for [AEDPA’s capital] fast-track program.”).

65. See Report of the Subcommittee on the Role of the Federal Courts (Richard A. Posner, Chair), 1 Federal Courts Study Committee, Working Papers and Subcommittee Reports (July 1, 1990), at 470–72 (reporting that steady drop in filings of habeas petitions per 100 state prisoners from a peak of 5.05 in 1970 to 1.85 in 1988—about the same level as in 1964—“refutes the claim that reform is necessary to stem the flood of petitions created by Supreme Court doctrinal innovation” beginning in 1963); see also U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics 1997, at 442 tbl.5.80, 444–45 tbl.5.82, 490 tbl.6.35 (Kathleen Maguire & Ann L. Pastore, eds.) [hereinafter 1997 Sourcebook of Criminal Justice Statistics] (indicating that habeas petitions per 100 prisoners dropped still further after 1988 and through 1995, on the eve of the enactment of AEDPA).

66. See 28 U.S.C. § 2244(d).

67. See id. § 2254(e).

68. See id. § 2254(d)(1).

69. See id. §§ 2244(a), 2244(b).

70. See id. § 2253(c)(2).

71. See *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (“All we can say is that in a world of silk purses and pigs’ ears, [AEDPA] is not a silk purse of the art of statutory drafting.”); Linda Greenhouse, *Death Penalty Gets Attention of High Court*, N.Y. Times, Oct. 30, 1999, at A1 (attributing Supreme Court’s recent spate of certiorari grants in capital cases in part to AEDPA’s poor drafting, which has left “the lower Federal courts . . . in disarray over how to interpret central provisions of the law”).

72. Nine forays in three years itself suggests the Act’s abstruseness.

73. See *Slack v. McDaniel*, 120 S. Ct. 1595 (2000); *Terry Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Michael Williams v. Taylor*, 120 S. Ct. 1479 (2000); *Hohn v. United States*, 524 U.S. 236 (1998); *Calderon v. Ashmus*, 523 U.S. 740 (1998); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Calderon v. Thompson*, 523 U.S. 538 (1998); *Lindh*, 521 U.S. at 320; *Felker v. Turpin*, 518 U.S. 651 (1996). *Michael Williams*, *Terry Williams*, *Martinez-Villareal*, *Ashmus*, *Thompson*, and *Felker* are all capital cases. The prisoner’s interpretation of AEDPA prevailed in *Slack* (on two separate questions), *Michael Williams*, *Martinez-Villareal*, *Hohn*, *Thompson*, *Lindh*, and *Felker*, and the split decision in *Terry Williams* favored the capital prisoner (who won habeas relief) more than the state. See also 1 Lieberman & Hertz, *supra* note 42, § 3.2 (Main Text & 2000 Supp.) (reviewing these decisions); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered*

AEDPA truly bites is in pro se cases (i.e., in nearly all noncapital habeas and many section 2255 actions), in which the Act's complexity is a minefield for the unwary.⁷⁴

Confounding Fund lawyers' predictions, therefore, the death-driven "reform" of the last fifteen years has been that procedural rights—habeas corpus included—"wither" first in capital cases, with the blight spreading to, and the devastation being greatest in, noncapital cases.⁷⁵ Replacing the sentiment that the state's irrevocable decision to take a capital defendant's life requires the epitome of procedural rights is revulsion against capital criminals and the realization that procedural rights take time.⁷⁶

Aspirations, 86 Geo. L.J. 2589, 2623–27 (1998) (noting habeas petitioners' success in litigating AEDPA issues before the Supreme Court).

74. See, e.g., *Henderson-El v. Maschner*, 180 F.3d 984, 985–86 (8th Cir. 1999) (concluding that district court did not err in dismissing habeas petition filed a few days after AEDPA's statute of limitations expired and in failing to apply rule treating date of filing as date prisoner deposited his habeas petition in the prison mailbox because the prisoner could not produce evidence proving he placed his petition in the mail before the limitations period had expired); *Rodriguez v. Klinger*, 1999 WL 394562, at *1 (10th Cir. June 16, 1999) (ruling that warden's failure to provide pro se prisoner with copy of AEDPA statute of limitations provision did not constitute adequate basis for equitable tolling because prisoner "failed to request a copy of the limitations provisions . . . [and] had access to an inmate research assistant . . . [who was] 'aware of the AEDPA limitations period and routinely advised inmates of same,'" when asked); *Fisher v. Johnson*, 174 F.3d 710, 714–15 (5th Cir. 1999) (holding that prison's delay in making text of AEDPA available to pro se prisoners did not call for equitable tolling of statute of limitations under the circumstances); *Paige v. United States*, 171 F.3d 559, 560–61 (8th Cir. 1999) (declining to extend prison mailbox rule to excuse delay caused by either a prison mail system or the United States postal service at the time Paige's brother mailed a draft of Paige's section 2255 motion to him from a different prison in which the brother was incarcerated); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (denying request for equitable tolling of AEDPA's statute of limitations, even though the private correctional facility in which the pro se petitioner was incarcerated did not have a copy of the new statute or case law interpreting it, because the petitioner (still proceeding pro se) "provided no specificity regarding . . . the steps he took to diligently pursue his federal claims"); *Gaines v. Newland*, 1998 WL 704418, at *2 (N.D. Cal. Oct. 6, 1998) (holding that prison mailbox rule did not apply because "petitioner alleges that, per his request, prison officials sent the petition to his grandmother" to file in court; rule is triggered only by delivery to "prison authorities for mailing to the clerk of court"); *Parker v. Johnson*, 988 F. Supp. 1474, 1476–77 (N.D. Ga. 1998) (denying pro se prisoner's motion to hold federal habeas petition, filed on last day before one-year statute of limitations expired, in abeyance pending exhaustion of state remedies on subset of unexhausted claims, thus forcing petitioner either to (1) give up his federal remedies on the unexhausted claims, which could only thereafter be brought to federal court in a "second or successive petition" barred by AEDPA, or (2) dismiss his petition as a whole pending exhaustion of the unexhausted claims, after which all of the claims would be barred by the federal statute of limitations).

75. Cf. *Ira P. Robbins, Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 293–301 (1986).

76. See, e.g., *Stephens v. Kemp*, 464 U.S. 1027, 1031–32 (1983) (Powell, J., dissenting from the grant of a stay of execution). In *Stephens*, Justice Powell argued:

That Stephens is innocent of the brutal, execution-style murder, after kidnapping and robbing his victim, is not seriously argued. . . . In the nearly nine years of repetitive litigation by state and federal courts there has been no suggestion that

Because time anywhere on earth is what the typical capital prisoner wants most—unlike the typical noncapital prisoner, whose litigation time is limited by the length of her prison term—the capital litigant wins something precious even by losing.⁷⁷ And because litigating and losing imposes costs on states, courts, victims, and the public, such litigation is thought to require “special” commands in capital cases (then, by undeserved association, in noncapital cases) to take fewer steps faster. Eventually, that is, the abolitionist campaign caused the Court to replace its mantra that “death is different in its irrevocability, so we need to *initiate* and to give *more* procedural protections there,” with the lament that “death is different in the amount of *delay* it foists on the system, so we need to initiate the *destruction* of, and give *fewer*, procedural protections there.”

Although opposite in intention and effect, the death-driven expansion of rights that Fund lawyers sought and secured for a time, and the death-driven contraction of rights their opponents secured more recently, share the same premise: Procedural rights, including post-trial procedural review, are the enemy of substantive capital punishment.⁷⁸

the death sentence would not be appropriate in this case. . . . Once again, . . . a typically “last minute” flurry of activity is resulting in additional delay of the imposition [sic] of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow.

Id. Professor Amsterdam has responded as follows:

[Justice Powell] nowhere tells us why it makes the least earthly difference to anybody but the condemned inmate whether the death sentence, if finally held valid, is executed three or four years rather than, say, two years after imposition. During the interim, the death-sentenced inmate is neither at large and dangerous nor unpunished; he is securely housed in a maximum security facility. When the last review in his case is over, he is still there for the state to execute at its convenience. If there is any evidence showing that any supposed deterrent efficacy of the death penalty is abated in the slightest by four-year delays instead of two-year delays in executions, I have not seen it. . . . So wherein lies the special evil of delay in capital cases? It is difficult not to see the answer peeping out between the lines of Justice Powell’s text. We—the Supreme Court of the United States—said seven years ago that the death penalty is constitutional. We are a serious court, and we meant what we said very seriously. But nobody seems to be taking us at all seriously; people are simply not getting executed, and here are all these lawyers running around making the system look foolish. That is not to be tolerated. Delay, in Justice Powell’s words, “undermines public confidence in our system of justice” It compounds the crime of murder by the crime of *lese majeste*.

Amsterdam, *supra* note 48, at 52 (citations omitted).

77. In fact, because most appellate and habeas victories result only in a new trial, which in noncapital cases often in turn results in a new conviction and the same sentence, many noncapital prisoners will not pursue review even *before* their term ends. In the case of capital prisoners, the prospect of an unsuccessful new trial and the review it will then engender is less daunting and even (compared to the grave) attractive. Moreover, retrials following reversals more often result in different and more favorable verdicts in capital cases than in noncapital ones. See *infra* notes 84, 124.

78. See Steiker, *Excessive Proceduralism*, *supra* note 2, at 315–16 (describing the impulse to “excessive proceduralism” on both sides of the debate).

"Effective Death Penalty Act" supporters repeatedly expressed this assumption,⁷⁹ and it suffuses an Act that in fact has nothing to do with the occasions or standards for imposing death sentences and everything to do with the occasions and process for reviewing them.

That assumption seems to be confirmed, moreover, by skyrocketing executions during the last fifteen years—jumping from five in 1983 to seventy-four in 1997, and to ninety-eight in 1999⁸⁰—as procedural protections have plummeted. On the standard account, cutting across all political views, proceduralism triumphed from the mid-1950s to the mid-1980s, causing capital punishment to collapse or barely function, while capital punitive substance has reigned ever since, fueling a collapse of capital (and by association noncapital) proceduralism and a consequent rise in executions.

There is much to say for the view that procedural rights defeat substantive capital punishment, and vice versa. In the rest of this Article, however, I suggest that the perverse result of reforms premised on this assumption has been to give post-trial proceduralism a substantively crucial role in administering the nation's capital laws. Those reforms have led our capital system to impose many more death sentences than are deserved (as measured by capital jurisdictions' substantive lights) and to be utterly dependent for the necessary additional winnowing on post-trial review procedures that are far more expensive and less effective than is practicable (as measured by just about everyone's procedural lights).

II. SUBSTANTIVE CAPITAL DECISIONMAKING AND THE DIFFERENCE POST-TRIAL REVIEW MAKES

Theorizing about the results of a comprehensive study colleagues and I conducted of all 4578 capital state appeals, 248 state post-conviction reversals, and 599 capital federal habeas cases decided between 1973 and 1995,⁸¹ the rest of this Article contends that the reality of the modern

79. See, e.g., 142 Cong. Rec. H3602 (1996) (AEDPA is necessary to remedy "a habeas corpus procedure that forbade the final solution to the death penalty problem; namely, the execution of the killer"); 141 Cong. Rec. S7659 (1995) ("[T]he far left in this country is fighting [the] habeas corpus reform [provisions of AEDPA]. . . because they hate the death penalty. . . . [T]hey have adopted a strategy [under the pre-existing habeas provisions] to make death penalty litigation so costly and so protracted that capital punishment is eliminated de facto.").

80. See NAACP Legal Defense & Educational Fund, Inc., *Death Row U.S.A.*, Summer 2000, at 9 [hereinafter *Death Row USA*]; U.S. Executions Hit 45-Year High, *Chi. Trib.*, Sept. 28, 1999, at N16.

81. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995* (2000) [hereinafter *Liebman et al., A Broken System*], abridged and reprinted in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases 1973–1995*, 78 *Tex. L. Rev.* 1839 (2000) [hereinafter *Liebman et al., Capital Attrition*]. *A Broken System*, supra, is available electronically at <<http://www.law.columbia.edu/instructionalservices/liebman/>> (on file with the *Columbia Law Review*). Because many state post-conviction decisions are not published and are difficult to obtain, we limited our study of cases at that stage to known reversals of capital verdicts. To obtain state post-conviction reversal rates,

American death penalty contradicts the assumption that post-trial procedural review is anathema to substantive capital punishment. In fact, our death-sentencing system now *depends* on an elaborate process of state and federal post-trial review. To be sure, state and federal statutes generally limit post-trial review to procedural scrutiny of capital convictions and sentences.⁸² But in the guise of making the *procedural* judgments those statutes permit, state and federal post-trial review has come to be an integral part of the modern American system of deciding who lives and who dies. More particularly, because trial actors have strong incentives to *over-produce* death sentences—putting two to as many as six or more individuals on death row for every one who would be there if trial actors bore the cost of their mistakes—it has fallen to state appellate and federal habeas judges to provide a crucial second stage of life-or-death screening.

This, however, is no defense of modern capital punishment *or* post-trial review. The system is perverse. It is immensely expensive because it requires multiple layers of repetitive *substantive* deliberation;⁸³ penologically risky because it garbles the deterrent and retributive message of a jury's imposition of a death sentence; egregiously prone to substantive error that its proceduralist review mechanisms are not designed to cure—inevitably letting people who are innocent or do not deserve the penalty die;⁸⁴ paralyzing to the courts because of the amount of their energies it

we took those reversals as a percentage of the capital verdicts known to have survived state direct appeal. Doing so produces extremely conservative estimates of state post-conviction reversal rates because it inflates the denominator by substituting the number of cases *available* for review for the smaller number *actually* reviewed. See Liebman et al., *A Broken System*, *supra*, at 26–27, 135 n.132, app. C-1–C-3.

82. See, e.g., 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994 & Supp. IV 1998); *Herrera v. Collins*, 506 U.S. 390, 400–02 (1993) (noting that habeas generally is limited to procedural, not substantive, review). For example, after initially suggesting that state appellate courts, possibly backstopped by federal habeas courts, had an Eighth Amendment duty to review capital sentences for substantive accuracy and statewide consistency, see *Zant v. Stephens*, 462 U.S. 862, 874–80 (1983) and *Gregg v. Georgia*, 428 U.S. 153, 204–06 (1976), the Supreme Court then absolved all of those courts of that duty, see *Arave v. Creech*, 507 U.S. 463, 476–77 (1993) and *Pulley v. Harris*, 465 U.S. 37, 43–46 (1984), and nearly all state courts promptly abandoned such review as a matter of state law. See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only 'The Appearance of Justice'?*, 87 J. Crim. L. & Criminology 130, 131–34 (1996); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. Colo. L. Rev. 813, 816–17 (1999).

83. It is one thing to back-stop a trial process that its decisionmakers' local loyalties strongly dispose to focus on substantive issues of guilt and punishment with a post-trial process that its distance from the local scene and commitment to national law strongly inclines to protect procedural rights. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1047–50 (1977); 1 Liebman & Hertz, *supra* note 42, § 2.6, at 101. It is quite another thing to rely on both processes to make the same substantive judgments.

84. Between 1972 and the beginning of 1998, 70 people were released from death row on the grounds that their convictions were faulty and there was too little evidence to retry them for murder or for any other homicide offense. See Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13

T.M. Cooley L. Rev. 907, 916, 964 tbl.2 (1996). For similar figures, see Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 *Law & Contemp. Probs.*, Autumn 1998, at 125, 130–32 [hereinafter Gross, *Lost Lives*]; Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, *Chi. Trib.*, Jan. 10, 1999, at N1 [hereinafter Armstrong & Possley, *Verdict Dishonor*]; Alan Berlow, *The Wrong Man*, *The Atlantic Monthly*, Nov. 1999, at 66, 68 [hereinafter Berlow, *Wrong Man*] (“[S]ince . . . 1976, more than eighty death-row inmates have been freed from prison . . . by evidence of innocence. That . . . is . . . equal to almost 15 percent of those actually executed—not good odds . . . given the stakes.”). As of July 2000, the number of inmates released from death row as factually or legally innocent since 1973 was 87, including nine released in 1999 and the first half of 2000 alone. See Richard C. Dieter, Letter to the Editor, *Death-Row Innocents*, *N.Y. Times*, July 14, 2000, at A24. An 88th and 89th death row exoneration were announced as this Article was going to press. See *Man Wins Acquittal in Retrial of Capital Case*, *Nat’l L.J.* Nov. 6, 2000, at A7 (discussing acquittal of William Nieves after 5.5 years on Pennsylvania’s death row); Brooke A. Masters, *DNA Clears Inmate in 1982 Slaying*, *Wash. Post*, Oct. 3, 2000, at A1 [hereinafter, Masters, *DNA Clears Inmate*] (discussing DNA-based exoneration of Earl Washington who previously spent 9.5 years on death row and an additional 7 years under a life sentence imposed by a governor’s reprieve based on earlier doubts about Washington’s guilt).

The 68 individuals released as of 1998 represent 1.2% of the 5879 individuals sentenced to death during the 1973–1998 period. See Gross, *Lost Lives*, *supra*, at 128 n.13, 130. Even (heroically) assuming that all innocent people sentenced to death are exonerated before being executed, that 1.2% figure “almost certainly undercount[s] the number of defendants erroneously convicted and sent to death row . . .” *Id.* at 131. One reason the figure is an undercount is that, at any given time, the capital judgments of over 50% of the individuals on death row are still under judicial review—a process that now lasts, on average, about 11 years. See Bureau of Justice Statistics, *U.S. Dep’t of Justice, Bulletin: Capital Punishment 1998*, NCJ 179012 at 1, 12, 13 & tbl.12, app.tbl.1 (Dec. 1999) [hereinafter *BJS 1998 Report*]; *infra* notes 95–100, 219, 245 and accompanying text. The 1.2% figure, accordingly, should at least be doubled to show the proportion of prisoners condemned between 1972 and 1998 who, *following full-scale judicial review*, will eventually be released for lack of enough evidence to retry or reconvict them. My own data suggest that 5% of death row inmates are proven not guilty following full review. See Liebman et al., *Capital Attrition*, *supra* note 81, at 1849–52 & fig.1 (finding that 68% of all capital verdicts fully reviewed between 1973 and 1995 were overturned by courts, and (based on retrial outcomes following reversals at the state post-conviction stage, where outcomes are known) that 7% of the capital verdicts that were retried were replaced by not-guilty verdicts, so that 5% of the *original* death verdicts ($.07 \times .68 = .048$) were replaced by not-guilty verdicts).

Of the 89 post-*Furman* exonerations as of October 2000, 14 occurred in Illinois alone—two more than the number of executions the state carried out in the same period. See Steve Mills & Ken Armstrong, *Another Death Row Inmate Cleared*, *Chi. Trib.*, Jan. 19, 2000, at N1 [hereinafter Mills & Armstrong, *Another Cleared*]; Lynn Sweet, *Death Row Debate Spurs Wave of Bills*, *Chi. Sun-Times*, Feb. 13, 2000, at 28 (reporting admission on direct appeal by Cook County, Illinois, State’s Attorney that one of six killings on which Hubert Gerald’s death sentence was based was committed by another man); Lorraine Forte, *Death Row Inmate to Receive New Trial*, *Chi. Sun-Times*, Feb. 11, 2000, at 12 (reporting that Gerald’s IQ “is somewhere between 46 and 51” and that the unrecorded confession allegedly given to police by Gerald was false). Other exonerations seem well on their way in Illinois and elsewhere. See Bruce Balesier, *Latham Attorneys Take on Texas’s Infamous Death Row*, *N.Y. L.J.*, June 30, 2000, at 24 (“Thirteen years after he was condemned to die for a crime it now seems he did not commit, Ernest Ray Willis suddenly has a glimmer of hope as he tries to accomplish the near-impossible and walk off of Texas’s death row.”); Holly Becka & Howard Swindle, *DNA Test Doesn’t Link Condemned Man to Girl: Hair Evidence Was Factor In Blair Murder Trial*, *Dallas Morning News*, June 21, 2000,

at A1 ("A new round of DNA testing has called into question a second piece of physical evidence that condemned Michael Blair to death row nearly six years ago for the abduction and murder of Ashley Estell."); Steve Mills, *Law School Team Says Wrong Man Convicted: Group Hopes to Clear Death Row Inmate*, Chi. Trib., Jan. 26, 2000, at N1 (discussing motion filed in the Illinois Supreme Court by a law professor and his students claiming (1) that death row inmate Edgar A. Hope, Jr. was wrongfully convicted of a 1982 murder—based on testimony by witnesses who now say Chicago police detectives coerced them into falsely identifying Hope as the killer—and (2) that they know who the real killer is); Brendan Riley, *Emotional Mazzan Released*, Las Vegas Rev.-J., May 7, 2000, at 1 (reporting reversal of John Mazzan's conviction in *Mazzan v. Warden*, 993 P.2d 25 (Nev. 2000), and his release on bail, 18 years after he was sentenced to die, based on proof—discovered when a police clerk inadvertently gave a defense investigator the wrong file—that the police chief and prosecutor had suppressed evidence that two other men committed the killing). Florida leads the nation in death row exonerations. See Sydney P. Freedberg, *Bush Rejects Idea of Death Penalty Ban*, St. Petersburg Times, Feb. 15, 2000, at 5B ("In Florida, . . . [t]wenty inmates have walked off death row—in three cases within 16 hours of execution—after evidence emerged that they were wrongly convicted. No state has released more condemned prisoners from death row."); see also Sydney P. Freedberg, *Ex-Death Row Inmate Gets Walking Papers*, St. Petersburg Times, Mar. 17, 2000, at 1A (discussing release of 21st former Florida death row inmate).

The number of innocent individuals put to death since *Furman* is anyone's guess. See, e.g., Armstrong & Possley, *Verdict Dishonor*, supra (discussing Sonia Jacobs of Florida, who was eventually freed [due to prosecutorial suppression of exculpatory evidence] but whose boyfriend, convicted on virtually identical evidence, had already been executed by the time her appeal prevailed); Berlow, *Wrong Man*, supra, at 68–69 (collecting statements from public officials who took steps to secure the execution of several named individuals whom those officials later came to believe or suspect were innocent); George F. Will, *Innocent on Death Row*, Wash. Post, Apr. 6, 2000, at A23 (conservative columnist and long-time death penalty supporter drawing the "inescapable inference," based on a review of Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000), "that some of the 620 people executed" since *Furman* "were innocent"); infra notes 142, 160, 237 (discussing the Stoker, Stockton, and O'Dell cases).

My confidence that *some* innocent people have been executed is based on two factors. The first is the astonishing *lack* of confidence that state prosecutors exhibit by fighting tooth and nail to keep from releasing DNA and other evidence that would verify the accuracy of capital convictions—if they are accurate. See, e.g., Frontline, *The Case for Innocence* (PBS television broadcast, Jan. 11, 2000), transcript at 1–2, 18–20 (statements of Ofra Bikel) (visited November 5, 2000) <<http://www.pbs.org/wgbh/pages/frontline/shows/case/etc/script.html>> (on file with the *Columbia Law Review*) (describing resistance of public officials to DNA testing of possibly innocent prisoners and media efforts to assist prisoners in obtaining such testing); Joe Lambe, *Inmate Wins Fight to Obtain DNA Test*, Kansas City Star, Mar. 11, 2000, at A1 (noting that DNA "tests have overturned dozens of convictions, but only Illinois and New York have laws that give prisoners a right to obtain them," and that as a result inmates claiming they were wrongly convicted "find themselves battling the legal system for a test that can clear or condemn"); Brooke A. Masters, *DNA Testing in Old Cases Is Disputed*, Wash. Post, Sept. 10, 2000, at A1 (discussing opposition of prosecutors to post-conviction DNA tests on grounds that it "is expensive and that reopening old cases upsets victims and diverts resources needed to solve new cases"); infra notes 118, 237. The second is the huge element of luck characterizing the discovery of many miscarriages of justice that put people on death row—for example, (1) the discovery of suppressed police files exonerating a Florida death row inmate as a result of a burglary of a district attorney's office, see Berlow, *Wrong Man*, supra, at 70, 74, or because a police clerk mistakenly released the wrong file, see the Mazzan case discussed above; (2) the various cases "broken" by the media and even journalism students after defense lawyers

diverts to a tiny subset of cases;⁸⁵ and destructive of public support for the

and the courts missed the errors, see, e.g., Stephen B. Bright, The American Bar Association's Recognition of the Sacrifice of Fairness for Results: Will We Pay the Price for Justice, 4 Geo. J. on Fighting Poverty 183, 184 (1996) [hereinafter Bright, Sacrifice of Fairness] (giving four examples of men released from death row as innocent after 60 Minutes, a filmmaker, and Northwestern University journalism students disproved or highlighted weaknesses in the cases against the inmates); Frontline, supra, at 5-6, 9, 20, 24-25 (providing other examples); Gross, Lost Lives, supra, at 151 (discussing exoneration of Randall Dale Adams after "documentary filmmaker Errol Morris ran into Adams by chance in 1985 . . . [and] went on to produce a movie about Adams's case, *The Thin Blue Line*, . . . [which] drew national attention to the case and resulted in Adams's release . . . twelve years after he had been sentenced to death"); Beth Hawkins & Kristin Solheim, The Wrong Man, Tucson Wkly., Dec. 8-14, 1993, at 1 (helping to break the Carriger case, discussed infra note 148); Evan Moore, Cloud of Doubt, Hous. Chron., Sept. 12, 1999, at 18 (describing role of press and member of the clergy in exposing egregious police and prosecutorial misconduct, leading eventually to exonerative DNA analysis and the freeing of Kerry Max Cook from Texas's death row after 20 years); see also Armstrong & Possley, Verdict Dishonor, supra ("catching prosecutors who have engaged in [unlawful] deception [at homicide trials] can be extremely difficult," and in the past has occurred, e.g., "only after a judge directed the U.S. marshal to seize the prosecutors' documents, or because newspapers sued under the Freedom of Information Act, or because of anonymous tips, conversations accidentally overheard or papers spied in a prosecutor's hand"); and (3) several exonerations occurring after the actual killer took the almost unbelievably against-interest step of confessing to a crime the police and the courts had claimed to have solved by convicting and condemning someone else, see cases discussed in Bright, Sacrifice of Fairness, supra, at 184; Gross, Lost Lives, supra, at 150; infra note 149 (discussing the Munsey case); infra note 151 (discussing the Ochoa case). In the words of Justice, now Chief Justice, Moses Harrison of the Illinois Supreme Court in a 1998 opinion:

If these men dodged the executioner, it was only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release. They survived despite the criminal justice system, not because of it. . . . One must wonder how many others have not been so fortunate.

Ken Armstrong & Steve Mills, Death Row Justice Derailed, Chi. Trib., Nov. 14, 1999, at N1 [hereinafter Armstrong & Mills, Justice Derailed] (quoting *People v. Bull*, 185 Ill. 2d 179, 228 (1998) (Harrison, J., concurring in part and dissenting in part)).

85. See, e.g., Hon. Alex Kozinski & Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 15-17 & n.70 (1995) [hereinafter Kozinski & Gallagher, Run-On Sentence] (discussing demands placed on federal habeas courts by challenges to state capital verdicts and citing estimate that one-third of 11th Circuit's staff resources are dedicated to processing death penalty cases); William C. Vickrey, Opinion Filings and Appellate Court Productivity, 78 Judicature 47, 50 (1994) (finding that during 1987-1993, capital cases accounted for 26% of the California Supreme Court's opinions and nearly 56% of its headnotes; also finding that capital cases presented, on average, more than three times as many issues requiring analysis by the court as noncapital cases; concluding that "capital cases as a class pose a great burden on the court"); S. V. Date, The High Price of Killing Killers, Palm Beach Post, Jan. 4, 2000, at 1A ("[T]he Florida Supreme Court . . . devotes approximately half its time to death penalty cases . . ."); Martin Dyckman, Death Penalty Repair, St. Petersburg Times, Dec. 7, 1997, at 1D (describing proposal of Gerald Kogan, Chief Justice of the Florida Supreme Court and former head of the Miami District Attorney's capital prosecution unit, "to seriously reconsider whether the death penalty is truly a viable remedy for first degree murder in the state of Florida," in part because capital punishment causes the Florida Supreme Court to "spend an inordinate amount of time . . . when there is so much out there that affects the average

courts, which, while in fact serving as the substantive *saviors* of the death penalty, are perceived by many as its sworn proceduralist *enemies*.

After presenting a statistical snapshot of American "Capital Punishment as a System,"⁸⁶ suggesting that capital trials vastly overproduce death sentences, I consider why that may be so.

A. A Brief Sketch of our Actual System of Capital Punishment

Since *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence.⁸⁷ Close to 100% of those sentences are reviewed on state direct appeal and, if affirmed, in a state post-conviction proceeding, and, if affirmed again, on federal habeas corpus.⁸⁸ Remarkably, during the twenty-three-year period of our statistical study, 1973–1995, the result of this process was the reversal by state direct appeal or state post-conviction courts of at least 47% of the capital judgments they reviewed,⁸⁹ and federal habeas reversal of 40% of the capital judgments that survived state review.⁹⁰ During the study period, that is, state courts (mainly) and fed-

citizen much more"); Paul Elias & Rinat Fried, A Failure to Execute, *The Recorder*, Dec. 15, 1999, at 12–14 (quoting Chief Justice of the California Supreme Court stating that his court's practice of denying all capital post-conviction petitions with a one-line order is necessitated by "the enormous amount of work" required simply to adjudicate each of the hundreds of pending capital petitions, leaving no time thereafter to "write full-blown opinions . . . and still keep up with its other work"; also quoting the Chief (federal) Judge of the Central District of California describing the "intensive" expenditure of time by federal district judges (who in that district follow a policy against referring capital cases to magistrates), in adjudicating each capital habeas petition, 80 of which were pending in that district alone as of December 1999); Jonathan E. Gradess, Execution Does Not Pay; Barbarism Aside, the Death Penalty Simply Isn't Cost Efficient, *Wash. Post*, Feb. 28, 1988, at C5 ("The United States Court of Appeals for the 11th Circuit in Atlanta, deep in the heart of the nation's death-penalty belt, complains that more than 30 percent of its docket is tied up with death-penalty cases."); Stan Swofford, A Reasonable Doubt: Are There Innocent People on North Carolina's Death Row, *Greensboro News & Rec.*, Aug. 6, 2000, at A1 (reporting estimate of former North Carolina Chief Justice Jim Exum that, as of 1994, his last year on the bench, the "justices were spending 70 percent of their time on death penalty cases").

86. See Jack Greenberg, *Capital Punishment as a System*, 91 *Yale L.J.* 908, 908 (1982).

87. See Table 4, *infra*. An average of 287 admissions to death row occurred each year during the period from 1984 (by which point most of the post-*Furman* death-sentencing states had managed to adopt presumptively constitutional statutes) to 1998.

88. See *infra* note 90 (discussing frequency with which capital prisoners appeal and pursue post-conviction remedies).

89. I say "at least" because we underestimated state post-conviction reversals. See *supra* note 81.

90. See Liebman et al., *Capital Attrition*, *supra* note 81, at 1849, 1850 & n.37, 1851 & fig.1, 1855 & n.51 (finding that 41% of American capital verdicts finally reviewed at the state direct appeal stage between 1973 and 1995 were reversed; very conservatively estimating that 10% of the capital verdicts that survived direct review and were finally reviewed at the state post-conviction stage were reversed at that second stage; finding, therefore, that at least 47% of capital verdicts reviewed in the state courts were reversed (.41 + .10 (.59) = .47); finding that 40% of capital verdicts that survived state review and

were fully reviewed by federal habeas corpus courts were reversed; and finding, therefore, that overall, at least 68% of all American capital verdicts finally reviewed by state and federal courts during that period were overturned by the courts (.41 + .10 (.59) + .40 (.53) = .68); also finding that of 2370 total reversals, 2133 (90%) were by state judges). For additional details, see Liebman et al., *A Broken System*, supra note 81, at 28–30.

Compare the 41% capital direct appeal reversal rate we found to the noncapital direct appeal reversal rate, which is certainly less than 15% and probably far less than 10%. Discussing the “fragmentary evidence on state court criminal reversals” on appeal, Professor Arkin cites a 23% reversal or sentence modification rate of the criminal judgments that Legal Aid lawyers appealed in the First and Second Departments of New York State in 1984, a 14% reversal or sentence modification rate among criminal appeals taken in the First District of California in 1974, and a 10% reversal and 12% modification rate for appeals taken in the California state courts between 1978 and 1981. See Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 *UCLA L. Rev.* 503, 516 (1992); see also Yale Kamisar et al., *Modern Criminal Procedure: Cases, Comments and Questions* 35 (8th ed. 1994) (estimating that the reversal rate in run-of-the-mill criminal appeals to state intermediate appellate courts is 5–10%); Joy A. Chapper & Roger A. Hanson, *Understanding Reversible Error in Criminal Appeals*, Final Report, National Center on State Courts 5 (1989) (reporting criminal appellate reversal rates ranging from 18% to 29% based on similarly fragmentary data).

These figures are vastly inflated, compared to the capital direct appeal and habeas corpus reversal rates revealed by our study, for the following reason: State law in nearly all states *requires* that capital judgments be appealed to the highest state court, see *Whitmore v. Arkansas*, 495 U.S. 149, 173–74 & n.1 (1990) (citing statutes), and as a matter of fact, virtually all capital judgments *are* appealed, see *id.* at 174–75 (“[S]ince the reinstitution of capital punishment in 1976, only one person, Gary Gilmore, has been executed without any appellate review of his case.”). If upheld on direct appeal, virtually all capital judgments are, in turn, challenged in state and federal post-conviction review procedures. See *Coleman v. Balkcom*, 451 U.S. 949, 956–57 (1981) (Rehnquist, J., dissenting from denial of certiorari) (describing typical post-trial course of proceedings in capital cases); Liebman et al., *A Broken System*, supra note 81, at 19–21. By contrast, only a small subset of noncapital criminal convictions are appealed. (The vast majority of convictions based on guilty pleas, for example, which constitute the vast majority of all convictions, are *not* appealed.) And only a tiny proportion of cases that are appealed are challenged in state and federal post-conviction proceedings. See Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 *S. Cal. L. Rev.* 2507, 2524 (1993) (estimating that only three to four of every 1000 noncapital state prisoners file a federal habeas corpus petition). A reversal rate of at most 25% of the at most 20% of noncapital verdicts that are appealed adds up to at most a 5% reversal rate for *all* noncapital judgments imposed at trial, compared to the at least 68% reversal rate for all *capital* judgments imposed at trial. In addition, the reversal rates for appeals taken by Legal Aid lawyers in New York are likely to inflate the rate in appeals generally, given the comparatively higher quality of such lawyers than of private appointed lawyers who handle criminal cases in the state. See, e.g., Chester L. Mirsky, *The Political Economy and Indigent Defense*: New York City, 1917–1998, 1997 *Ann. Surv. Am. L.* 891, 948, 971 (presenting a number of critiques of private appointed criminal defense lawyers in New York City as “attorneys of questionable competence” who “lower[ed] the quality of representation”); Jane Fritsch, *Legal Aid is Given Bigger Court Role*, *N.Y. Times*, June 14, 1994, at A1 (reporting decision of the New York City administration to shift cases of indigent defendants away from private appointed lawyers and back to Legal Aid to ensure “better monitoring of legal work” and avoid the “opportunity for egregious failure”); Jane Fritsch & Matthew Purdy, *Option to Legal Aid for Poor Leaves New Yorkers at Risk*, *N.Y. Times*, May 23, 1994, at A1 (claiming that the explosion of private appointed criminal defense lawyers has created a flawed system and raised questions about the quality of work); David Rohde, *Critical Shortage of Lawyers for*

eral courts reversed 68%—i.e., *more than two of every three*—of the capital judgments that were fully reviewed.⁹¹

Poor Seen, N.Y. Times, Dec. 12, 1999, at 59 (recounting view of criminal justice officials that assigned private appointed criminal defense lawyers in New York City were providing the “lowest-quality legal representation in decades”). And reversal rates for appeals taken only to intermediate courts are probably inflated, because they do not report the fate of intermediate court decisions that are appealed to the highest state court—a larger proportion of which are probably appealed to the highest court by state’s attorneys who lost at the intermediate stage than by defense lawyers who did so. The reversal/sentence modification rates for the small subset of criminal judgments that were *appealed* in California state courts during the period between 1978 and 1981 may also be somewhat unrepresentative because they cover a period when the California Supreme Court, presided over by Chief Justice Rose Bird, was relatively sympathetic to criminal defendants’ appeals. See Bright, *Sacrifice of Fairness*, *supra* note 84, at 184.

The noncapital reversal rate on state post-conviction is close to zero. On habeas corpus, it is almost certainly less than five percent. See Brief Amicus Curiae of Benjamin Civiletti, et al., in support of the Respondent at app.A, n.1, *Wright v. West*, 505 U.S. 277 (1992) (No. 91-542) (reporting findings of studies of reversal rates in noncapital habeas cases); Meltzer, *supra* note 90, at 2524 (estimating that reversal rate in capital and noncapital habeas cases combined is 3.2%).

For these reasons, the overall error rate in noncapital cases, which colleagues and I (deliberately erring on the high side) estimated to be 15%, in Liebman et al., *Capital Attrition*, *supra* note 81, at 1854–55 n.49, is probably less than one-third that amount.

91. See Liebman et al., *A Broken System*, *supra* note 81, at 4–5, 28–30. Because state direct appeal courts review all capital judgments and state post-conviction courts review nearly all those that survive direct review, while federal courts review only those judgments that survive both stages of state court review, the state and federal court systems’ relatively similar reversal rates (47% and 40%, respectively) produce many more state court reversals (about 90% of the total) than federal court reversals (the remaining 10%). See *id.* at 9, 28–29. For a state-by-state compendium of overall (combined state and federal court) capital reversal rates, ranging from 18% in Virginia to 91% in Mississippi, see *id.* at 74–76, app.A. For impressionistic press accounts of high reversal rates in a variety of states, see, e.g., Ames Alexander & Liz Chandler, *Errors, Inequities Often Cloud Capital Cases in the Carolinas*, *Charlotte Observer*, Sept. 10, 2000, at 1A (“Since 1977, when the Carolinas restored the death penalty, more than half of all death sentences have been thrown out because of flawed trials.”); Ken Armstrong & Christi Parsons, *Half of State’s Death-Penalty Cases Reversed*, *Chi. Trib.*, Jan. 22, 2000, at 1 (“An Illinois Supreme Court ruling on Friday pushed the number of death-penalty cases in Illinois that have been reversed for a new trial or sentencing hearing to 130—exactly half the total of those capital cases that have completed at least one round of [state] appeals”); Mike Carter, *Court Orders Retrial in 1986 Murder Case*, *Seattle Times*, July 15, 1999, at B1 (noting that state and federal courts have reversed three Washington State capital convictions and an additional seven Washington State capital sentences since 1999—in a state with only 14 men on death row as of the end of 1998, see BJS 1998 Report, *supra* note 84, at 14, app.tbl.2); Lee Davidson, *Death Row the End? Most Get Out Alive*, *Deseret News* (Salt Lake City), Dec. 13, 1999, at B1 (of 16 prisoners who have left Utah’s death row since that state reinstated the death penalty in 1973, 6 were executed and 10 (63%) had their convictions or sentences overturned by the courts); Elias & Fried, *supra* note 85 (“Since 1978, when . . . California . . . reinstituted the death penalty, 647 men and women have been sentenced to death. Only eight have been executed. Nearly four times as many California death row inmates have died in San Quentin of causes other than execution. Fifty-seven sentences have been overturned.”); Howard Mintz, *The Capital Punishment Gridlock in California*, *San Jose Mercury News*, Mar. 12, 2000, at A1 [hereinafter Mintz, *California Gridlock*] (reporting that between 1993 and 1999, California’s death row grew from 350 to about 550

This one-in-three figure, however, greatly *overestimates* the likelihood of execution, as is revealed by additional statistical windows on the system. For example, the Justice Department's annual study of the death penalty reports the outcome, as of the study date, of death sentences imposed in each prior year since 1973. Consider the outcomes of death sentences imposed in 1989.⁹² The cases of 103 of the 263 people sentenced to die that year had been resolved by the end of 1998 (when the last Justice Department report ends).⁹³ Among those 103 inmates, 78 (76%) had their capital judgments overturned by a state or federal court; only 13 (<13%) had been executed (compared to 9 who died of other causes).⁹⁴ By *this* measure, for every one death row inmate whose case

inmates, but it only executed six men; in the same period, federal courts overturned 13 death sentences, and by a separate count, state courts overturned at least five death sentences and probably considerably more than that, see Liebman et al., *A Broken System*, supra note 81, at app.C-10); Rene Stutzman, *High Court Puts Death Cases Back into Play*, Orlando Sentinel, Aug. 24, 1999, at D1 (reporting that in the first eight months of 1999, the Florida Supreme Court found trial errors requiring retrial, resentencing, or imposition of a life sentence in 83% (10/12) of the first-time death penalty appeals it reviewed; the figure for all of 1998 was 77% (20/26)); Sean Whaley, *ACLU Attorney Finds Flaws in Many Death Row Cases*, Las Vegas Rev.-J., Feb. 7, 2000, at 1B (stating that since 1993, eight Nevada death row inmates have had their convictions reversed in the courts, including three who were thereupon released from prison and another who may be released "soon" following the state supreme court's February 2000 reversal of his conviction because local "prosecutors withheld evidence at his 1979 trial that could have led to his acquittal"; since 1979, eight men have been executed in the state, all but one after giving up their appeals and volunteering to be executed, see *Death Row USA*, supra note 80, at 8). See also Spencer Hunt, *Death Penalty Process Remains Slow and Unsteady*, Cincinnati Enquirer, Sept. 10, 2000, at A17 (noting that, although "Ohio courts have sent 200 people to death row over the past 19 years[,] . . . the state has executed only one person in that time, and that one only because . . . [he] wanted to die"; also reporting the state chief justice's doubts "whether anyone on the state's death row actually will be put to death"); Duncan Mansfield, *The Price of Death Penalty, Maybe Millions*, Associated Press Newswires, Mar. 26, 2000 ("Tennessee, with 97 people on death row [who have accumulated over at least 21 years] is [still awaiting] its 1st execution since 1960.").

The 68% "reversal rate" in capital cases understates the actual "error rate." See Armstrong & Mills, *Justice Derailed*, supra note 84 (noting that in addition to reversing half of the capital judgments it has reviewed, "the Illinois Supreme Court has upheld scores of death sentences while forgiving trial errors that benefited prosecutors, dismissing the errors as harmless," including in Anthony Porter's case where the court based the harmlessness findings on the "[o]verwhelming" evidence of his guilt; Porter was later released as innocent because another man confessed to his crime); infra note 239 and accompanying text.

92. For this purpose, 1989 was an average year, although, notably, it was the year in which the Supreme Court pulled the rug out from under the Great Writ. See *Teague v. Lane*, 489 U.S. 288, 289-91 (1989) (discussed supra notes 41, 47, 51 and accompanying text).

93. See BJS 1998 Report, supra note 84, at 13, app.tbl.1.

94. See id. It might be that the 103 cases decided as of 1998 will prove to have a higher proportion of reversible error than the 160 cases awaiting review, so that the executions-to-reversals rate will eventually be higher than the one to six rate revealed after "only" nine years. One might expect inspections to find considerably fewer defective products later in the inspection process than earlier in the process when clear defects are

was finally reviewed during that nine-year period and who was executed, exactly *six* inmates had their cases overturned in the courts.

This one-in-seven statistic still overestimates the likelihood of execution. It ignores the fact that there was *no* outcome as of nine years later for 160 (61%) of the 263 people sentenced to die in 1989.⁹⁵ That is because the amount of state and federal judicial review needed to uncover the astonishingly high number of reversible legal errors found in capital judgments takes on average about eleven years per capital judgment.⁹⁶ No wonder, then, that the approximately 3600 people on death row as of 1999 had been there while their cases underwent review in the courts for an average of 7.4 years.⁹⁷ And no wonder that those 3600 death row inmates comprised well more than half of the approximately 6700 individuals sentenced to die in the preceding *twenty-seven years*.⁹⁸ So, not only are a large majority of capital judgments ultimately found to be seriously legally flawed by the courts; worse, *all* of them are suspended for eleven years on average while the massive error-detection operation proceeds. From this perspective, the best description of our capital punishment system is that of the 6700 people sentenced to die between 1973 and 1999, only 598—*less than one in eleven*—were executed.⁹⁹ About four times as many had their capital judgments overturned or were granted clemency.¹⁰⁰

What most condemned men and women do after being sentenced to die is wait—for eleven years, on average. And what most of them, in real-

quickly spotted and removed. The study colleagues and I conducted of the rates of error discovered in capital verdicts reviewed first on state direct appeal, then, if no reversible error was found at that stage, in state post-conviction proceedings, and then, if no reversible error was found, in federal habeas corpus proceedings, does not bear out this hypothesis. Rather, we found that (1) from 1973 to 1995, the third, federal habeas, stage of judicial inspection found reversible error in 40% of capital verdicts reviewed at that stage, compared to 41% at the first, direct appeal stage and more than 10% at the second, state post-conviction stage; and (2) rates of error discovered in earlier (state) and later (federal) inspections are remarkably similar, whether the two rates are compared nationally over the entire 23-year study period, by state, or by year. See Liebman et al., *A Broken System*, supra note 81, at 26–27, 29–30, 38 fig.3, 62–66 & figs.9 & 10, 135 n.132. These data suggest that the executions-to-reversals rate revealed after the relevant death sentences are “only” nine years old is a decent predictor of the rate that will exist after all the relevant judgments have been finally reviewed.

95. See BJS 1998 Report, supra note 84, at 13 & app.tbl.1.

96. See id. at 12, tbl.12; infra notes 219, 245.

97. See BJS 1998 Report, supra note 84, at 1, 14 app.tbl.2; *Death Row USA*, supra note 80, at 1.

98. See BJS 1998 Report, supra note 84, at 13 app.tbl.1 (reporting that 6431 individuals were sentenced to die between 1973 and 1998, and revealing that the average annual number of new admissions to death row from 1989 to 1998 was 288, thus generating the 6700 estimate for death sentences as of 1999).

99. See id. (reporting that 500 persons were executed from 1973 to 1998); *Death Row USA*, supra note 80, at 1 (reporting that 98 persons were executed in 1999). Returning to our 1989 example, of the 263 people sentenced to die in 1989, only 13—*less than one in 20*—had been executed by 1998.

100. See BJS 1998 Report, supra note 84, at 13 app.tbl.1.

ity, are waiting *for* is not execution, but reversal of their capital judgments because of serious legal error.

Is this, though, old news? Given that the number of executions has risen dramatically as of late,¹⁰¹ aren't these one-in-three, one-in-seven, and one-in-eleven estimates a thing of the past? Not so. Even in a banner year like 1999, when the number of executions reached a nearly fifty-year high of ninety-eight¹⁰² only one death row inmate was executed for every three people added to the row in the same year.¹⁰³ Thus, as we will see next, it is not a dramatic new will to kill, but the monotonous quarter-century drip, drip, drip of men and women accumulating on death row and gradually exhausting their appeals, that has caused executions to rise.

B. *A Hint of Overproduction*

Whatever one thinks of the death penalty, the numbers just discussed are disturbing. Any system generating two or more duds for every keeper—and requiring more than a decade to find it—is irrational and cries out for explanation.¹⁰⁴

101. See *supra* note 80 and accompanying text.

102. See *infra* Table 1.

103. Given the current death row population and rate of death row admissions, it would take 54 years, at a rate of one execution a day, 365 days a year, to reduce the number of death row inmates to zero. See also David Bruck, *On Death Row in Pretoria Central*, *The New Republic*, July 13 & 20, 1987, at 19 (estimating, in 1987, that it would take one execution per day, every day, to eliminate the then-existing death row backlog, estimated at 1900, by the year 2000); BJS 1998 Report, *supra* note 84, at 13 app.tbl.1 (reporting a death row population of nearly 3500 in 1998, nearly double the reported 1987 population).

104. Two explanations besides those considered in the text deserve attention. The first, suggested by a famous debate about eighteenth-century England—where, to overstate things slightly, almost every crime was a felony subject to mandatory capital punishment, but almost no one convicted of a felony was executed—prompts the question whether evident irrationality obscures a highly functional system. In Douglas Hay's elegant and controversial view, the eighteenth-century English death penalty was in fact a brilliant method of preserving social control and hierarchy in a time of intense social dislocation of the peasantry on its way to becoming the working class. See Douglas Hay, *Property, Authority and the Criminal Law*, in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* 17, 20, 25 (Douglas Hay et al. eds., 1975). In Hay's view, letting the local gentry decide which among the many criminals who *could* be prosecuted capitally *were*, and which death sentences would be commuted by the crown, enabled the ruling class to maintain social control by simultaneously terrorizing the lower classes with death sentences and a few executions and co-opting them with myriad merciful dispensations. See *id.* at 46–49.

A similar ascription of method to the madness that otherwise bedevils the modern American death penalty might focus on deterrence. Punitive deterrence classically involves a trade-off between the diminished liberty of the punished miscreant and the enhanced liberty of a more secure public. The theory thus prefers penalties that sacrifice less of the convict's liberty without diminishing public safety. Assume, therefore, that potential offenders to whom the deterrent regime addresses the cautionary tale of D's punishment pay a lot more attention when D is sentenced to death than when he is executed, and pay vastly more attention to both events than to D's release from death row

on a legal ground years later. If that is so, it might make deterrent sense to sentence many offenders to death with great fanfare, execute a small number with similar fanfare, while sneaking the rest off death row when no one is looking—thus enhancing the lucky prisoners' liberty while incurring little or no deterrent penalty.

This thesis has two problems. First, there is no evidence that the American system of capital punishment is even modestly focused on deterrence. Most people who support the death penalty do so despite doubts that it deters. See Samuel R. Gross, Update: American Public Opinion on the Death Penalty—It's Getting Personal, 83 Cornell L. Rev. 1448, 1459 (1998); Dan M. Kaban, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 437–39 (1999). These doubts are well-founded. See, e.g., David Lester, The Death Penalty: Issues and Answers 83–100 (2d ed. 1998) (concluding that economic studies provide inconclusive evidence of the deterrent effect of the death penalty); Ruth D. Peterson & William C. Bailey, Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research, in *America's Experiment with Capital Punishment* 157, 173–74, 177 (James R. Acker et al. eds., 1998) (arguing that “evidence against capital punishment as an effective deterrent is extensive and cannot be dismissed”); Michael L. Radelet & Ronald L. Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. Crim. L. & Criminology 1, 7–9, 12–15 (1996) (reporting that 94% of criminologists surveyed found weak or no empirical support for the deterrent effects of the death penalty). More important, unlike eighteenth-century England's mandatory death penalty, which was carried out in properly deterrent—meaning brutal and terrorizing—fashion, in the town square on market day, preceded by fiery sermonizing on the object lesson intended thereby, see Hay, *supra*, at 31, the late twentieth-century American death penalty seems designed to *minimize* deterrence. To begin with, the imposition of death sentences today is highly discretionary (mandatory death sentencing being constitutionally forbidden, see *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)), and occurs in only a tiny proportion of murder cases, see *infra* Table 4. Moreover, the sentence is executed using “humane” methods that dispatch “mad-dog” killers via technologies developed to “put” the beloved Fido “to sleep.” See *Chaney v. Heckler*, 718 F.2d 1174, 1180–81 (D.C. Cir. 1984), *rev'd*, 470 U.S. 821 (1985) (noting that executions by lethal injection rely on drugs and procedures initially developed to euthanize family pets); Bill Dedman, Supreme Court to Review Use of Electric Chair, N.Y. Times, Oct. 28, 1999, at A24 (34 of 38 capital-sentencing states now use lethal injection as the sole or principal method of execution). Finally, modern executions occur in secret, in the wee hours of the morning, at a prison in the middle of nowhere, with the public, via the electronic media, sedulously excluded (see *KQED, Inc. v. Vasquez*, 1995 WL 489485 (N.D. Cal. Aug. 1, 1991); ACLU of Northern California, Press Release, ACLU Challenges San Quentin's Secret Execution Procedures, Feb. 14, 2000 (on file with the *Columbia Law Review*) (criticizing California's rule barring reporters from viewing important stages of lethal injection process); cf. Jef I. Richards & R. Bruce Easter, Televising Executions: The High-Tech Alternative to Public Hangings, 40 UCLA L. Rev. 381, 420 (1992) (arguing that regulations forbidding media coverage of executions violate the First Amendment)), and with only the family of the victim present, if they please, see Thomas Zolper, Whitman Adds to Victims' Families' Rights, The Record (Bergen County, N.J.), Dec. 24, 1999, at A4 (discussing New Jersey law permitting kin of murder victims to witness executions). See generally Jonathan S. Abernethy, The Methodology of Death: Reexamining the Deterrence Rationale, 27 Colum. Hum. Rts. L. Rev. 379, 422 (1996) (arguing that, given legislators' explanation of the death penalty as necessary for deterrence purposes, “death penalty states ought to publicize and dramatize their executions in an attempt to instill fear in those who might be tempted to commit murder . . . [and] to utilize severe methods of killing capital offenders,” but “contrary to what logic seems to dictate, the attempt over time has been to make the penalty of death gentle, hidden, and antiseptic”). Nor are death-sentence reversals the low-impact events that this deterrence theory imagines. On the contrary, the passionate dissenting opinions, media frenzy, and venting of spleen by local officials that accompany many such

An obvious explanation is suggested in Part I: Post-trial review is the enemy of substantive capital punishment, neutralizing two (or more) of every three death sentences imposed.

I have two reasons for questioning this explanation. To begin with, the numbers suggest that trial and post-trial criminal procedural rights and the administration of substantive capital criminal law are not as inversely related as observers have long thought. Although a steady accretion of procedural and post-trial review rights through the early or mid-1980s has been followed by their steady diminution ever since, the number of executions each year has been more volatile than a strictly inverse relationship would predict, as Table I shows. And the number of executions per capita remains well below the levels reached prior to the Criminal Procedure Revolution, as Table 2 reveals.¹⁰⁵

reversals—often equaling or outstripping the publicity given to death sentences when imposed and carried out—surely does more deterrent harm than liberty-hoarding good. See, e.g., *infra* note 236.

A second explanation might be the highly *retributive* character of a modern American “death” sentence. More accurately described, that penalty is “life in prison without possibility of parole but with the uncertain and unpredictable possibility of execution some years later.” The highly retributive nature of this psychologically agonizing penalty can hardly be doubted. Indeed, under accepted human rights norms, this penalty is the equivalent of torture. See, e.g., *Pratt v. Attorney General for Jamaica*, 4 All E.R. 769, 770–71 (P.C. 1993) (holding that detention longer than five years between death sentence and execution is presumptively cruel and inhuman); *Soering v. United Kingdom & Germany*, 161 Eur. Ct. H.R. (ser. A) at 44–45 (1989) (upholding refusal to extradite capital charged individuals to the United States because an American capital sentence would involve suffering of “exceptional intensity or duration” in violation of human rights norms); see also *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari) (urging Court to grant review of claim that confinement on death row for 23 years prior to execution constitutes cruel and unusual punishment); *Jones v. State*, 740 So. 2d 520, 525 (Fla. 1999) (concluding that prompt action by court in capital cases is required by “judicial economy and a sense of justice”); Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 Seton Hall L. Rev. 147, 211 (1998) (“Under [Supreme Court’s] objective criteria . . . inordinate delay between the imposition of a sentence and the actual execution of a capital defendant violates the Eighth Amendment.”). Even so, this second proffered explanation of American capital punishment as a system is not convincing. If the penalty is designed to be *more* retributive than death, it fails. Only a small fraction of death row inmates volunteer to be executed immediately to avoid the delay and uncertainty to which the theory’s claim of hyper-retribution is tied. See *Death Row USA*, *supra* note 80, at 9–20. And allowing prisoners to opt out of delay and uncertainty by consenting to be executed is hardly consistent with an intention to maximize those, by hypothesis, retributive aspects of the modern death penalty. If, instead, the penalty is designed to be *less* retributive than death, but more than life without parole, for those who end up escaping execution, there still would have to be some proportionality-based logic to the allocation of death and the lesser penalty, which there evidently is not. And “delay” would be perceived as a good thing by all except those on death row, not the other way around.

105. This is so, even though per capita incarceration is now much higher than when executions per capita were at their peak. See U.S. Dep’t of Justice, *Sourcebook of Criminal Justice Statistics* 1998, at 490 tbl.2 (Kathleen Maguire & Ann L. Pastore, eds.) (per capita incarceration rates in the 1930s and 1940s, when per capita executions were at their peak, ranged from 98 to 137 per 100,000 residents; from 1990 to 1997, incarceration rates rose

from 297 to 445 per 100,000 residents).

Consider also that two of the 38 American death-sentencing states, Texas and Virginia, account for nearly half of the executions during the 1990s period of increased executions. When only executions in the other 36 capital-sentencing states are considered, the increase is not so dramatic, and only once (1999) has exceeded an average of one execution per state for the year:

	Total Executions	Executions in States Other than Texas and Virginia
1990	23	16
1991	14	7
1992	31	15
1993	38	16
1994	31	15
1995	56	32
1996	45	34
1997	74	28
1998	68	35
1999	98	49
Total	478	247 (52%)

Id. at 537 tbl.6.92; *Death Row USA*, *supra* note 80, at 11–19; see Frank Green, *Virginia Bucks Death Row Flow*, *Richmond Times-Dispatch*, Mar. 13, 2000, at A1. That 11 of the Supreme Court's last 16 decisions on the merits in capital cases have occurred in cases in which the Virginia Supreme Court and the Fourth Circuit have affirmed Virginia capital judgments provides some support for the argument offered below that post-trial review serves the function of winnowing excess death sentences following their "overproduction" at the trial stage. Because the Virginia Supreme Court and the Fourth Circuit have the lowest reversal rates in capital cases of, respectively, any state supreme court or federal circuit court in the nation, see Green, *supra*; Liebman et al., *A Broken System*, *supra* note 81, at 47–49, 57, 61, 63, 64, 66, 68–72, 103–07 & tbls.4, 7, 10, 25 & figs.8–13, 33, the Supreme Court may feel that the winnowing task falls to it in Virginia capital cases. See *Ramdass v. Angelone*, 120 S. Ct. 2113, 2114 (2000) (affirming 4th Circuit decision); *Terry Williams v. Taylor*, 120 S. Ct. 1495, 1495 (2000) (reversing 4th Circuit decision); *Michael Williams v. Taylor*, 120 S. Ct. 1479, 1479 (2000) (reversing 4th Circuit decision in part); *Weeks v. Angelone*, 120 S. Ct. 727, 727 (2000) (affirming 4th Circuit decision); *Strickler v. Greene*, 527 U.S. 263, 265 (1999) (affirming 4th Circuit decision, but rejecting most of lower court's analysis); *Lilly v. Virginia*, 527 U.S. 116, 116 (1999) (reversing Virginia Supreme Court decision); *Breard v. Greene*, 523 U.S. 371, 372 (1998) (*per curiam*) (affirming 4th Circuit decision); *Buchanan v. Angelone*, 522 U.S. 269, 270 (1998) (affirming 4th Circuit decision); *O'Dell v. Netherland*, 521 U.S. 151, 152 (1997) (affirming 4th Circuit decision); *Gray v. Netherland*, 518 U.S. 152, 154 (1996) (vacating 4th Circuit decision); *Tuggle v. Netherland*, 516 U.S. 10, 11 (1995) (*per curiam*) (vacating 4th Circuit decision). See also Greenhouse, *supra* note 71 (noting an "unusual flurry" of four certiorari grants in capital cases in the Supreme Court's 1999 Term, three of which were in Virginia/4th Circuit cases); Brooke A. Masters, *4th Circuit Is Steering Hard to the Right*, *Wash. Post*, July 5, 2000, at B1 (finding in recent Supreme Court decisions a message "that the 4th Circuit had gone too far in death-penalty cases"); Tim McGlone, *State's Death-Row Cases Draw High-Court Scrutiny*, *The Virginian-Pilot*, Dec. 9, 1999, at A1 (describing recent Supreme Court decisions as "applying the highest level of scrutiny in modern times to [Virginia's] handling of death penalty cases").

TABLE 1: ANNUAL EXECUTIONS BETWEEN 1966 AND 1998¹⁰⁶

	Nonconsensual Executions	Total Executions
1966-76	0	0
1977	0	1
1978	0	0
1979	1	2
1980	0	0
1981	0	1
1982	1	2
1983	5	5
1984	21	21
1985	14	18
1986	17	18
1987	23	25
1988	10	11
1989	14	16
1990	16	23
1991	14	14
1992	30	31
1993	31	38
1994	27	31
1995	49	56
1996	37	45
1997	70	74
1998	58	68
1999	88	98

106. Death Row USA, *supra* note 80, at 21-23. This table considers nonconsensual executions as well as total executions (which include those occurring voluntarily in advance of full judicial review) because the former provide a more appropriate focus whenever, as here, the question is how many death sentences have been deemed by a full complement of courts to be free of reversible legal error.

TABLE 2: AVERAGE EXECUTIONS PER CAPITA IN THE UNITED STATES, 1930-1996¹⁰⁷

Year	Population	Executions	Executions per million population
1930	123,076,741	155	1.26
1940	132,122,446	124	0.94
1950	152,271,417	82	0.54
1960	180,671,158	56	0.31
1965	194,302,963	7	0.04
1970	205,052,174	0	0.00
1973	211,908,788	0	0.00
1974	213,853,928	0	0.00
1975	215,973,199	0	0.00
1976	218,035,164	0	0.00
1977	220,239,425	1	0.00
1978	222,584,545	0	0.00
1979	225,055,487	2	0.01
1980	227,224,681	0	0.00
1981	229,465,714	1	0.00
1982	231,664,458	2	0.01
1983	233,791,994	5	0.02
1984	235,824,902	21	0.09
1985	237,923,795	18	0.08
1986	240,132,887	18	0.07
1987	242,288,918	25	0.10
1988	244,498,982	11	0.04
1989	246,819,230	16	0.06
1990	249,464,396	23	0.09
1991	252,153,092	14	0.06
1992	255,029,699	31	0.12
1993	257,782,608	38	0.15
1994	260,327,021	31	0.12
1995	262,803,276	56	0.21
1996	265,228,572	45	0.17
1997	267,783,607	74	0.28
1998	270,248,003	68	0.25
1999	272,690,813	98	0.36

107. Execution data is from *Death Row USA*, supra note 80, at 9; 1997 Sourcebook of Criminal Justice Statistics, supra note 65, at 538 tbl.6.88. Population data is from U.S. Census Bureau, Historical National Population Estimates (last modified June 28, 2000) <<http://www.census.gov/population/estimates/nation/popclockest.txt>>.

TABLE 3: AVERAGE ANNUAL NONCONSENSUAL EXECUTIONS

1966-76	0
1977-83	1
1984-91	16
1992-94	29
1995-98	53
1999	88

Even acknowledging that it is possible to smooth out the curve (as Table 3 does by analyzing average annual executions in uneven groups of years), there is reason to doubt whether events in *recent* years (the demise of proceduralism) as opposed to ones in *earlier* years (when proceduralism was in full flower) account for most of the increase. Consider that the post-*Furman* record number of executions in a year, set in 1999—88 nonconsensual executions (98 if volunteers count)¹⁰⁸—represented less than *three percent* of those on death row. Consider also, as noted above, that with 300 new death sentences each year for decades, but with many fewer executions, inmates have been steadily piling up on death row: The individuals executed against their will in 1998 (the last year in which the relevant data are available) were sentenced on average about eleven (and in some cases more than twenty) years before.¹⁰⁹ As the number of prisoners “awaiting execution” rises, one would also expect executions to rise simply because of the pile-up (i.e., due to events going back decades, when current inmates were first admitted to death row). Instead of the raw number of executions each year, it thus makes sense to consider the *proportion* of death row inmates executed each year.

The right-most two columns in Table 4 present that information, revealing that the proportion of death row executed annually has not risen nearly as fast or as steadily as the raw number of executions (shown in Table 3). Indeed, as Figure 1 demonstrates, although the number of executions (the middle curve) has risen substantially, the rate of death row inmates executed (the bottom curve) has been remarkably low and flat. (As Figure 2 shows—by magnifying the rate of death row inmates executed ten-fold—that rate has not been entirely flat. But it has been much flatter than the number of executions.) Thus, what appears to be dragging the number of executions (the middle curve) upward is not an increase in the nation’s deadly intestinal fortitude but, instead, the sharp and steady rise in the number of death row inmates (the top curve) as a result of the nation’s ongoing inability to get death sentences right at trial or to catch the many errors in less than a decade each. The bare fact that

108. See Death Row USA, *supra* note 80, at 21-23; *supra* note 106.

109. See BJS 1998 Report, *supra* note 84, at 12, tbl.12; *supra* notes 96-97 and accompanying text. As of December 31, 1998, there were 45 people on death row who had been there for more than 20 years. See *id.*; see also Elias & Fried, *supra* note 85 (reporting that, of the 555 men and women on California’s death row, 109 (20%) have been there for 15 years or longer).

nonconsensual executions in the modern era have never topped 2.5% (*one in forty*) of the inmates on death row in a given year, and in the 1990s have averaged about 1.3% (*one in seventy-six*) of those inmates, is itself a telling datum about the anemic relationship between the number of people put on death row and the number we “mean” to execute.¹¹⁰

Results from the study colleagues and I conducted provide further reason to doubt the explanatory power of the zero-sum, substance-procedure assumption. For one thing, from 1983 through 1995 (the last year data are available), state direct appeal and federal habeas corpus reversal rates in capital cases were rather stable—combined, they hovered around sixty percent—while state post-conviction reversals may have increased, notwithstanding the supposed collapse during those years of the procedural rights on which the obstructionism theory rests.¹¹¹ For another thing,

110. The *San Jose Mercury News's* recent analysis of the aftermath of California death sentences provides a telling case study:

Since [1978], the state's death row has mushroomed to 564 condemned inmates, the largest in the nation. But its enormity is misleading: The state's capital punishment system is collapsing under its own weight, the victim of a paralyzed legal system

[Darrell] Rich, who spent 19 years [on death row] despite his failure to win a single appeal, is scheduled on Wednesday to become just the eighth man put to death since the state's voters restored capital punishment in 1978. He most likely will be the only inmate executed in California this year [1999].

A *Mercury News* examination of California's capital punishment system shows that Rich's case is no aberration. In fact, given the odds, there was a much better chance Rich would die of natural causes than lethal injection . . . : 17 condemned inmates have simply expired on death row An additional 13 death row convicts have committed suicide

There are more than 100 inmates at San Quentin who have spent 15 years or more on death row Nearly half the condemned population has been on death row for at least 10 years

Mintz, California Gridlock, *supra* note 91. Although California prosecutors and juries have long put about 36 inmates on death row each year—exhibiting “the eagerness of ‘death belt’ states like Texas and Florida”—the state supreme court decides only 14 capital cases a year. *Id.* (Even when conservative Malcolm Lucas headed the court, and it affirmed 96% of the death cases it reviewed in 10 years, it still only processed 24 cases a year.) And each case remains under review in the state courts for an average of eight to ten years—three to five years devoted to finding a lawyer able to take the appeal; a year or two more to process the record; the rest in briefing and deliberation—followed by the same period in the federal courts. *Id.* No executions occurred in California between 1978 and 1991; between 1992 (when the death row population was 350) and 1999 (when the number reached about 550), seven executions occurred, compared to approximately 22 state and federal court reversals. See *id.*; Elias & Fried, *supra* note 85; see also Green, *supra* note 105 (“Twenty-four years after the U.S. Supreme Court allowed states to bring back the death penalty, 38 have chosen to do so, but only one, Virginia, is now executing the condemned at a faster pace than they enter death row”; whereas Virginia added 7 people to its death row and executed 14 in 1999, Texas, California, and Florida added, respectively, 48, 36, and 15, but only executed 35, 2, and 1; Illinois with 161 and Pennsylvania with 223 people on death row each executed only 1 person); *supra* note 91 (discussing comparable situation in other states).

111. See Liebman et al., A Broken System, *supra* note 81, at 35–39 & figs.3–4.

TABLE 4: DEATH ROW POPULATION, EXECUTIONS, AND PERCENT EXECUTED, 1973-1999

Year	Initial Death Row Pop.	New Death Sentences	Total Death Row Pop.	Total Executions	Nonconsen. Executions	% Executed	% Noncon. Executions
1973	334	42	376	0	0	0	0
1974	134	149	283	0	0	0	0
1975	244	298	542	0	0	0	0
1976	488	233	721	0	0	0	0
1977	420	137	557	1	0	.18	0
1978	423	187	610	0	0	0	0
1979	483	152	635	2	1	.31	.16
1980	595	174	769	0	0	0	0
1981	697	229	926	1	0	.11	0
1982	863	268	1131	2	1	.18	.09
1983	1073	254	1327	5	5	.38	.38
1984	1216	283	1499	21	21	1.40	1.40
1985	1421	268	1689	18	14	1.07	.83
1986	1589	299	1888	18	17	.95	.90
1987	1800	289	2089	25	23	1.20	1.10
1988	1964	291	2255	11	10	.49	.44
1989	2111	263	2374	16	14	.67	.59
1990	2232	252	2484	23	16	.93	.64
1991	2346	264	2610	14	14	.54	.54
1992	2466	289	2755	31	30	1.13	1.09
1993	2575	291	2866	38	31	1.33	1.08
1994	2716	321	3037	31	27	1.02	.89
1995	2890	322	3212	56	49	1.74	1.53
1996	3064	317	3381	45	37	1.33	1.09
1997	3242	274	3516	74	70	2.10	1.99
1998	3328	285	3613	68	58	1.88	1.61
1999	3452	300	3752	98	88	2.61	2.37

Sources: BJS 1998 Cap. Pun. Study (death row pop.; 1999 is est.); Death Row U.S.A., Winter 2000 (executions)

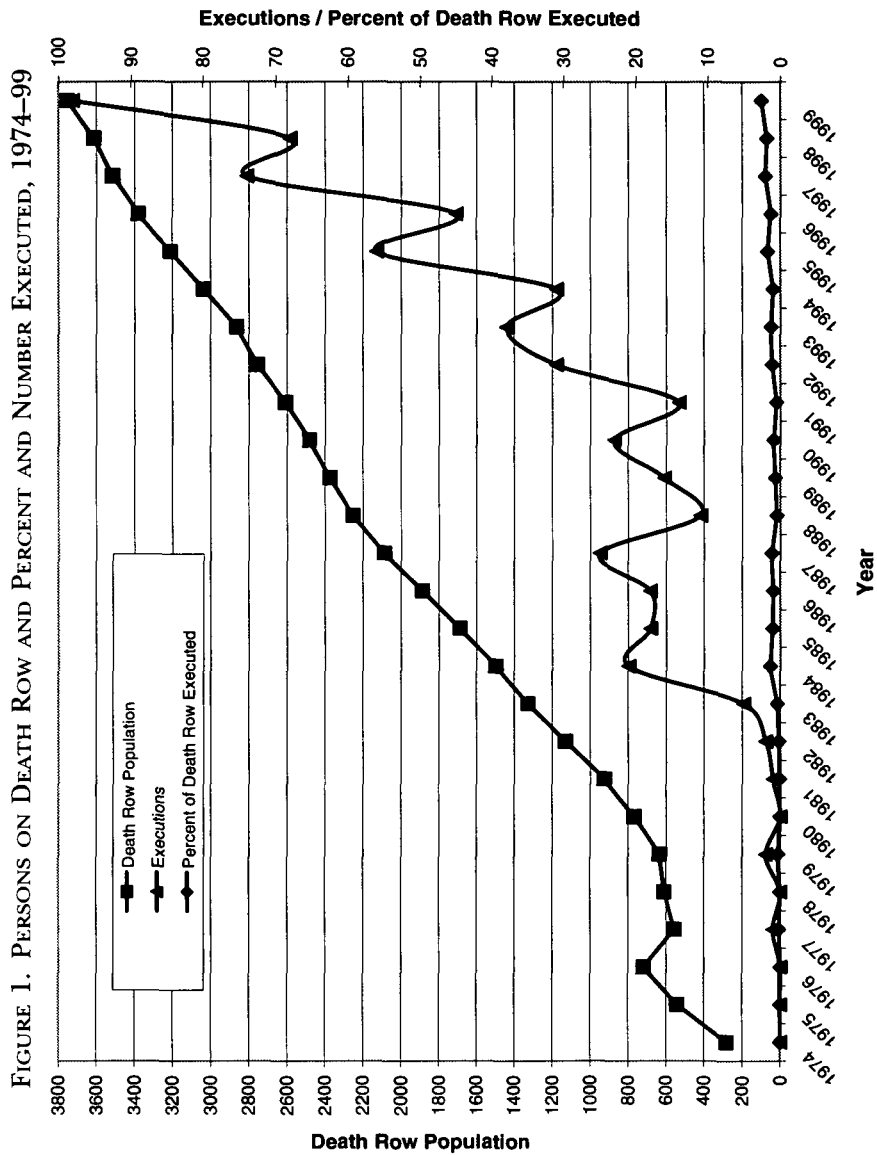
our study found evidence that states that impose more death sentences per capita or per homicide tend to carry out the death sentences they impose less frequently, suggesting a correlation between overuse of the death penalty and commission of the kinds of reversible errors that keep death sentences from being carried out.¹¹²

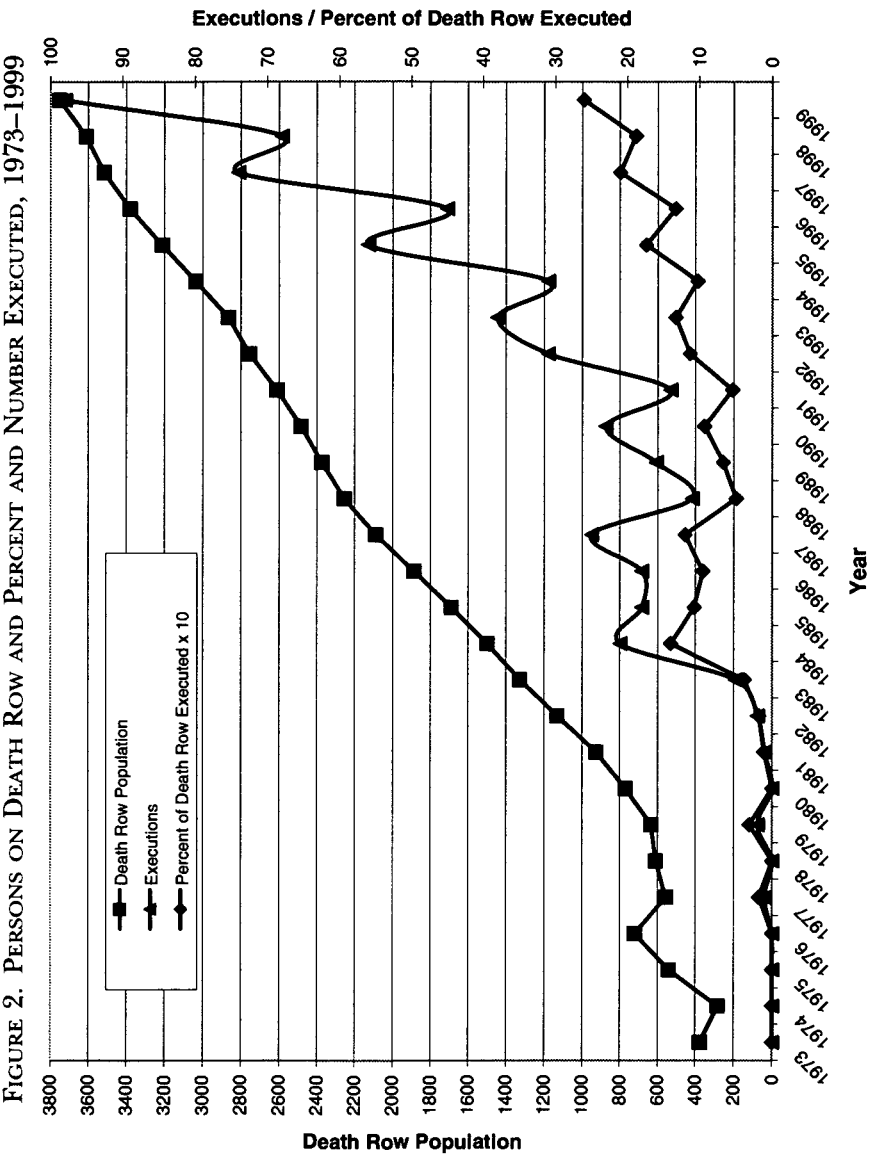
Preliminary results from a follow-up study provide additional hints of what is at work here besides procedural obstructionism, namely, trial-level overproduction of death sentences and post-trial *substantive* winnowing. The data indicate that the likelihood of relief on state direct appeal and federal habeas corpus are positively correlated with:

1. each other—suggesting that federal habeas relief is not driven by problems on state direct appeal (or by figments of federal judges' imaginations), but that relief at *both* post-trial stages is driven by the same kinds of *trial* "errors";¹¹³

112. See *id.* at 78–87.

113. See *id.* at 62–66 & figs.9–10.





2. a state's death sentences per capita, per homicide, and per dollar spent on the criminal justice system and how quickly after *Furman* the state adopted a death sentencing statute, sentenced under it, and executed someone under it—suggesting that post-trial relief is a function of a state's (meaning, its prosecutors') propensity to use the death penalty;¹¹⁴

114. See *id.* at 96–99 & figs.29–30; see also John Blume & Theodore Eisenberg, Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study, 72 S. Cal. L. Rev. 465, 469 (1999) (“The [per-murder] rate at which states impose [death] sentences strongly correlates with the rate at which [post-sentence] relief was obtained from those sentences.”). There is no doubt that some prosecutors use the death penalty at vastly higher rates than others. As Richard Willing and Gary Fields report, “[f]ifteen counties account for nearly a third of all prisoners sentenced to death [in the United States] but only one-ninth of the population of the states with capital punishment”:

Baltimore [Maryland] . . . has averaged 320 murders a year in the 1990s, but it had only one person on death row last Jan. 1. Suburban Baltimore County, which has averaged 29 murders a year during the same period, had four on death row. Hamilton County, Ohio, which includes Cincinnati, had 50 people on death row as of last Jan. 1. Up Interstate 71, prosecutors in Franklin County, which includes Columbus, had only 11 on death row, though the county's population is 14% larger than Hamilton's and it has twice as many murders. Tiny Baldwin County, Ga., population 42,000, had five people on death row, one more than Fulton county, which includes Atlanta and has 722,400 people. Fulton County averages 230 murders a year, Baldwin County about two. . . . In Texas, Harris County (Houston) . . . accounts for . . . 140 . . . of the state's death row inmates. . . . Dallas, with a higher murder rate, has only 37 people on death row Oklahoma City . . . accounts for 62 of its death row inmates Tulsa . . . , with a population 80% the size of Oklahoma [City's] and a murder rate nearly as high, sentenced only 19 killers to death.

Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA Today, Dec. 20, 1999, at 1A; see also Brief of Virginia College of Criminal Defense Attorneys and Virginia Trial Lawyers Association as Amici Curiae in Support of Petitioner at *6–*8, *Williams v. Taylor*, 120 S. Ct. 1479 (No. 98-8384) (2000) (“More defendants [6.5% of the state's total] have been sentenced to death in the Circuit Court of the City of Danville [with .8% of the state's population] than in any other jurisdiction in Virginia.”); Barry Nakell & Kenneth A. Hardy, *The Arbitrariness of the Death Penalty* 125–29 (1987) (noting that a study of charging decisions in 661 potentially capital cases in North Carolina found different capital indictment rates that “cannot be explained by the quality of the evidence in the cases”); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutgers L. Rev. 27, 327 (1988) (concluding based on statistical analysis that prosecutorial decisionmaking in 703 potentially capital cases in New Jersey “varie[d] greatly across counties and result[ed] in an overall capital case processing system which is impermissibly arbitrary”); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. Crim. L. & Criminology 1067, 1074 (1983) (concluding based on statistical study that “the chances of a first degree [i.e., capital] indictment for otherwise comparable cases were significantly greater in the central region than elsewhere in Florida”); Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 Ind. L. Rev. 495, 530 (1996) (contrasting capital charging and sentencing practices in Houston (population 2.8 million, 174 death penalty jury trials between 1984 and 1993, 64 such trials between 1992 and 1994, 108 death row inmates as of 1994) and Dallas (population 1.8 million, 35 death penalty jury trials between 1984 and 1993, 5 such trials between 1992 and 1994, 31 death row inmates as of 1994)); John M. Baer, Faulkner,

3. state judges' vulnerability to partisan political discipline and other political measures—suggesting a relationship between relief and incentives to over-convict and over-sentence;¹¹⁵ and

4. the relative weakness of the evidence and low levels of aggravation net of mitigation in the case—suggesting that post-trial review focuses in part at least on substantive as opposed to procedural considerations.¹¹⁶

Mumia in Mix, State Senate Hearing Set on Moratorium for Death Penalty, *Phila. Daily News*, Feb. 21, 2000, at 7 (noting that Philadelphia, with 13% of Pennsylvania's population, is responsible for 55% (126/230) of the state's death row population; 88% of the inmates the Philadelphia district attorney put on death row are African American or Latino); Tina Rosenberg, *Deadliest D.A.*, *N.Y. Times*, July 16, 1995, (Magazine), at 21, 42, 46 (describing Philadelphia District Attorney Lynne Abraham's policy of seeking the death penalty in all homicide cases with a statutory aggravating circumstance present—including many domestic homicides that virtually no other prosecutor in the country treats as potentially capital—with the result that her county's "death-row population of 105 [as of mid-1995] is the third largest of any county's in the nation, close behind Houston's Harris County and Los Angeles County [which are] far more populous and murderous than Philadelphia"; noting that prosecutors in Pittsburgh's Allegheny County sought the death penalty in only eight cases in 1994, compared to Philadelphia prosecutors, who did so in at least 59, and that prosecutors in Houston (itself a high death-sentencing county) sought the death penalty in only seven cases and succeeded only 6 times in 1991, compared to Philadelphia where prosecutors sought the death penalty at least 59, and succeeded 12, times in 1991); cf. Richard Willing, *Reno Shows Reserve on Death Penalty*, *USA Today*, June 14, 1999, at 8A [hereinafter Willing, *Reno Shows Reserve*] (reporting that although her predecessor Attorneys General approved proposed capital prosecutions 90% of the time, Attorney General Janet Reno has done so only 30% of the time).

Statewide factors also contribute to higher or lower death-sentencing rates. See Rosenberg, *supra*, at 25 (noting that Pennsylvania's large number of statutory aggravating circumstances (originally 10; subsequently increased to 17), and the practice there of charging all killings as potentially capital "criminal homicides" and allowing jurors to select the degree, rather than requiring prosecutors from the start to choose between capital murder or a lesser, noncapital degree, make it much easier for prosecutors there than in other states to proceed capitally). For impressionistic evidence that high capital sentencing jurisdictions have high capital error rates, see Ken Armstrong, "Cowboy Bob" Ropes Wins—But at Considerable Cost, *Chi. Trib.*, Jan. 10, 1999, at N13 [hereinafter Armstrong, *Cowboy Bob*] (discussed *infra* notes 172–173 and accompanying text); Ken Armstrong & Steve Mills, *Flawed Murder Cases Prompt Calls for Probe*, *Chi. Trib.*, Jan. 24, 2000, at N1 [hereinafter Armstrong & Mills, *Flawed Cases*] (noting that Cook County prosecutors tried eight of the 13 men falsely sentenced to die in Illinois between 1978 and early 2000); Eric Zorn, *Daley's Oversight of Prosecutors Didn't Do Justice to the Job*, *Chi. Trib.*, Nov. 16, 1999, at N1 [hereinafter Zorn, *Daley's Oversight*] (reporting that 76 of Illinois's 285 death row inmates in the post-*Furman* era (as of 1999) were put there by lawyers under Cook County state's attorney Richard M. Daley before he was elected Mayor; 46 of those cases (61%) were thereafter reversed by state and federal courts).

115. See Liebman et al., *A Broken System*, *supra* note 81, at 93–96 & figs. 27–28 (developing evidence suggesting that political pressure on judges may contribute to high death sentencing rates which, in turn, may contribute to high error rates which, in turn, may lead to low rates at which death sentences are carried out). See also Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. Rev.* 759, 776–80 (1995) (showing that judges in nearly all capital punishment states are elected).

116. Initial analyses by colleagues and myself suggest that federal habeas reversals are correlated to relatively weak evidence of guilt and low levels of aggravation net of mitigation.

The last datum is hardly news, moreover, given (1) the substance-focused sufficiency-of-the-evidence, prejudice, materiality, and harmless error standards that now dominate much of capital post-trial review;¹¹⁷ (2) the expanding post-trial use of DNA and other investigative techniques for exonerative purposes during post-trial proceedings;¹¹⁸ (3) the Supreme Court's and Congress's increasingly frequent treatment of innocence and "innocence of the death penalty" as "gateways" to habeas review and relief (albeit only upon a concurrent finding of a procedural violation);¹¹⁹ (4) the Court's halting recognition of a right not to be exe-

117. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 289–96 (1999) (finding that capital prosecutor's suppression of exculpatory evidence was not unconstitutional because withheld evidence was not "material" in the sense that it probably affected the outcome); *Brecht v. Abrahamson*, 507 U.S. 619, 627–38 (1993) (replacing harmless error standard that previously had applied in habeas proceedings with more demanding outcome-focused standard taken from *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *Arizona v. Fulminante*, 499 U.S. 279, 295–302 (1991) (applying harmless error analysis to admission of coerced confession at capital trial); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (applying harmless error standard to the unconstitutional admission of expert testimony at capital trial); *Strickland v. Washington*, 466 U.S. 668, 691–96 (1984) (holding that incompetent representation by counsel did not warrant reversal of conviction or death sentence because error did not demonstrably affect the outcome); *Jackson v. Virginia*, 443 U.S. 307, 313–24 (1979) (denying habeas relief based on constitutional sufficiency-of-evidence claim because evidence permitted rational juror to find guilt beyond a reasonable doubt).

118. See, e.g., Bill Dedman, *DNA Evidence Frees Two in Murder Case*, *Milwaukee J. Sentinel*, Apr. 25, 1999, at 20 (discussing two Oklahoma inmates' release from life and death sentences based on DNA exoneration and noting that "the men are the 61st and 62nd inmates in the nation to be exonerated by DNA evidence, according to the Justice Department," and that "Williamson is the 78th person in the country since 1970 to be cleared after being on death row"); John McCormick, *Coming Two Days Shy of Martyrdom*, *Newsweek*, Feb. 15, 1999, at 35 (discussing success of investigative journalism class conducted by Professor David Proffess of Northwestern University in helping to clear death row inmate Anthony Porter and four other inmates by recreating crime scenes, tracking down alternative suspects, reinterviewing witnesses, and the like); cf. Henry Weinstein, *Many Resist DNA Testing for Inmates*, *L.A. Times*, Feb. 21, 2000, at A1 [hereinafter Weinstein, *Many Resist DNA Testing*] (reporting that many prosecutors resist requirements to save biological samples and to make them available for DNA testing by convicted felons who claim they are innocent, notwithstanding the 64 DNA-based exonerations as of then in the United States, and the growing chorus of support for liberalized prisoner access to DNA testing).

119. *Herrera v. Collins*, 506 U.S. 390, 404 (1993); see, e.g., 28 U.S.C. §§ 2244(b), 2254(e) (Supp. IV 1998) (permitting habeas review despite otherwise preclusive failure to raise or develop claim earlier when there is clear and convincing evidence that, but for a constitutional error, no reasonable factfinder would have found the petitioner guilty of the crime); *Schlup v. Delo*, 513 U.S. 298, 313–14 (1995) (permitting habeas review of otherwise defaulted claim upon sufficient showing that petitioner is actually innocent); *Sawyer v. Whitley*, 505 U.S. 333, 346–47 (1992) (forbidding habeas review of procedurally defaulted claim attacking death sentence because "actual innocence" exception to procedural default bar requires proof, at least, that but for a constitutional violation, the defendant would not have been eligible for the death penalty, and is not satisfied by proof that but for the violation the defendant would have presented additional mitigating evidence, or even by proof that but for the violation the mitigating circumstances would likely have outweighed the aggravating circumstances, warranting a life sentence); *Jordan*

cuted when innocent;¹²⁰ and (5) its recognition of a right to, typically *appellate*, resentencing upon a conclusion that the jury may have sentenced the defendant to die without a proper determination of whether he satisfied the minimum levels of culpability,¹²¹ aggravation,¹²² and aggravation net of mitigation required for a death sentence.¹²³ Given these substance-driven innovations, it no longer is accurate to associate post-trial review exclusively with enforcing procedural rights as opposed to substantive defenses to conviction or a death sentence.¹²⁴

Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303, 308, 375–80 (1993) (exploring the new “innocence-focus” of modern habeas law and asking whether it supports habeas review of “bare-innocence” claims); cf. Steiker, *Excessive Proceduralism*, *supra* note 2, at 327 (noting “absurdity” of fact that making a colorable showing of innocence “is only an occasion for reaching the merits of [the] constitutional claims,” so that if those “claims turn out to be unpersuasive, the court must deny relief” to a likely innocent prisoner). The relevance of innocence is a recent innovation. See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (habeas applies “regardless of the heinousness of the crime . . . [or] the apparent guilt of the offender”); *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (Holmes, J.) (“[W]hat we have to deal with [on habeas] is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”); 1 Liebman & Hertz, *supra* note 42, § 2.5 (discussing the relevance of innocence to habeas corpus relief), Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970) (acknowledging but criticizing doctrine limiting habeas to procedural error irrespective of guilt or innocence).

120. See *Schlup*, 513 U.S. at 314 n.28, 315–16 & n.32, 317 (“In *Herrera*, we assumed for the sake of argument that in a capital case a truly persuasive demonstration of actual innocence . . . would render the execution . . . unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim”; “[i]n such a case . . . it is appropriate to apply an extraordinarily high standard of review,” requiring “a truly persuasive demonstration of actual innocence” (internal quotations omitted)).

121. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987) (ruling that death penalty is proper only if the defendant was an active accomplice in events leading up to, and was at least grossly reckless with regard to, the killing); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (holding that death sentence was excessive penalty for defendant who was minor participant in events leading to killing and did not kill or intend or attempt to kill).

122. See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 360–66 (1988) (holding that death sentence was invalid because it was premised on statutory aggravating circumstance that was unconstitutionally vague); *Godfrey v. Georgia*, 446 U.S. 420, 427–33 (1980) (holding that death sentence was invalid because it was based on a statutory aggravating circumstance that did not meaningfully distinguish defendants who should live from those who should die because it was not defined or applied in a principled manner).

123. See, e.g., *Richmond v. Lewis*, 506 U.S. 40, 48–49 (1992) (ruling that appellate court that has struck down an aggravating circumstance on which a death sentence was based may affirm the death sentence if, and only if, it reweighs valid aggravating and mitigating circumstances or conducts harmless error review); *Parker v. Dugger*, 498 U.S. 308, 319–20 (1991) (similar); *Clemons v. Mississippi*, 494 U.S. 738, 751–52 (1990) (similar); *Cabana v. Bullock*, 474 U.S. 376, 389–90 (1986) (ruling that, on remand, some state court must determine whether defendant had sufficient culpability to permit death sentence under *Enmund*, but permitting state supreme court to make the necessary factual determination itself, without remanding to trial level for a new sentencing hearing).

124. Also suggesting that post-trial review is crucial to the substantive functioning of the system are: (1) multi-layered, repetitive review (suggesting that so little quality control during the production process requires so many inspectors in succession at the end of the process to find the duds); (2) reforms that do all sorts of things *except* decrease the number

These empirical results are too preliminary to be relied upon here. They have, though, set me thinking about a second reason to doubt the view that trial-level actors usually “get it right” substantively only to have their handiwork diminished by the discovery of “merely technical” violations on post-trial procedural review. That reason—the focus of the rest of this Article—emerges from an effort to identify the probable extent, and allocation, of the rewards and harms of imposing undeserved death sentences. This effort suggests that the rewards and harms are immense, but that the benefits go almost entirely to trial-level actors—police, prosecutors, trial judges, and jurors—and are largely undiminished by anything defense counsel do at trial, while the costs fall almost entirely elsewhere. In other words, if you were a capital prosecutor, it might be in your interest to obtain as many capital sentences as possible—including even undeserved ones—along with the political capital (pun intended) they bring with them, because the onus of any mistakes you make will fall elsewhere.

of layers and actually *add* layers, see, e.g., 28 U.S.C. §§ 2244(b)(3), 2254(b)(3) (Supp. IV 1998) (AEDPA provisions adding new “gate keeping” layer of court of appeals review in advance of district court review in successive petition cases and directing federal habeas courts to require exhaustion of state remedies even when lawyers for state fail to object to lack of exhaustion in timely manner); *O’Sullivan v. Boerckel*, 526 U.S. 838, 839–40 (1999) (holding that exhaustion of state remedies sufficient to permit habeas review requires petition for discretionary state supreme court review of lower state court decision, even though state law discourages such petitions); *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (concluding that district court may not adjudicate claims in habeas petition as to which state remedies have been exhausted if petition also contains other claims as to which exhaustion has not occurred; instead, “district court must dismiss such ‘mixed petitions,’ leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims,” thereby waiving the excised claims); Howard Mintz, *The Capital Punishment Gridlock: Federal Reform Fails to Speed Up Process*, *San Jose Mercury News*, Mar. 13, 2000, at 8A [hereinafter *Mintz, Capital Punishment Gridlock*] (discussed *infra* note 253 and accompanying text); (3) emphasis on substance-focused “materiality” and/or “prejudice” tests that require evidence of innocence or nondesert of the death penalty that did not come out at trial, see *Steiker, Excessive Proceduralism*, *supra* note 2, at 318; leading (4) to an overall system in which courts have multiple ways to avoid adjudicating the validity of procedures when there is no “desert” issue that cries out for relief, but multiple ways around those barriers where qualms about “desert” do impel relief; and (5) evidence that the effect of a post-trial reversal of a capital verdict is often not a new trial with the same outcome, but a lesser punishment upon settlement or a lesser verdict on retrial, see, e.g., *Liebman et al., Capital Attrition*, *supra* note 81, at 1851–52 & fig.1 (reporting that nationally 82% of retrials following reversals of capital verdicts on state post-conviction review between 1973 and 2000 resulted in a sentence less than death or no sentence at all, including 7% that resulted in acquittals); *Moore*, *supra* note 84 (discussing Kerry Max Cook’s four trials for rape and murder, the first three of which ended in death sentences and the fourth in a plea bargain to time served); *Rhett Morgan, Killer’s Death Sentence Overturned*, *Tulsa World*, Apr. 4, 2000, at 23 (discussing decision of Oklahoma jury to sentence Benny Dwight Jones to life without parole at his third trial; both prior trials had resulted in death sentences that the Oklahoma high court overturned due to legal error).

C. *Why Overproduction Might Occur*

In considering why the overproduction of death sentences might occur, it is helpful to contrast what might be called the “dedicated pro-death penalty forces” and the “dedicated anti-death penalty forces.” The dedicated pro-death penalty forces are local police and prosecutors. They care deeply about getting death sentences; they are competent and energetic and thus quite good at accomplishing that goal; and there are a lot of them, with a fair amount of resources that are concentrated at the *trial* level. By contrast, the anti-death penalty forces are made up mainly of privately funded death penalty lawyers; they care deeply about stopping executions; they are competent and energetic and thus quite good at accomplishing that goal; but there are only a few of them—certainly no more than 250, even when hangers-on are counted—and very early on they made a crucial (probably disastrous, though probably unavoidable) strategic decision to concentrate *their* efforts at the *post-conviction* stages, causing the state to expend huge amounts of resources at those same stages to counter their efforts. The result is that the pro-death penalty forces have their way at trial, essentially generating as many death sentences as it is professionally rewarding to generate, while anti-death penalty lawyers are able at the later stages of the process, if not to have *their* way, then at least to have substantial success exposing the astonishingly high amounts of error rates documented above. Let me explain, beginning with the anti-death penalty bar.

1. *The Anti-Death Penalty Strategy: Keep the Powder Dry.* — The anti-death penalty bar has three crucial traits: It is small and poorly funded,¹²⁵ competent and strategic, and attracts large amounts of opposing resources when and where it chooses to intervene. Arrayed before

125. See generally Robert Weisberg, Who Defends Capital Defendants?, 35 Santa Clara L. Rev. 535, 537–43 (1995) (describing the patterns of capital representation in the South and in California and the “infamously low” fees for such work that are provided in some states); Richard J. Wilson & Robert L. Spangenberg, State Post-Conviction Representation of Defendants Sentenced to Death, 72 Judicature 331, 333–37 (1989) (detailing the results of a study of state law governing appointment of counsel in capital state post-conviction proceedings and the poor compensation of court-appointed attorneys in that context). On the shortage of counsel, see *McFarland v. Scott*, 512 U.S. 1256, 1262 (1994) (Blackmun, J., dissenting from denial of certiorari) (discussing availability of counsel in Texas capital post-conviction proceedings and concluding that “[c]apital defendants . . . must rely almost exclusively on volunteer private counsel . . . who are increasingly difficult to find”); John C. Godbold, *Pro Bono* Representation of Death Sentenced Inmates, Lecture delivered before the Ass’n of the Bar of the City of N.Y. (Apr. 29, 1987), in 42 Rec. of the Ass’n of the Bar of the City of N.Y. 859, 866 (1987) (“Most states have had no effective means of appointing or supplying counsel at the state habeas level [of capital cases].”); Esther F. Lardent & Douglas M. Cohen, The Last Best Hope: Representing Death Row Inmates, 23 Loy. L.A. L. Rev. 213, 217 (1989) (arguing that “the courts, the legal profession and society face a growing crisis in securing counsel” in capital cases, particularly at the appellate and post-conviction levels); Kozinski & Gallagher, *Honest Death Penalty*, supra note 1 (noting that the capital context is “the one area where there aren’t nearly enough lawyers willing and able to handle all the current cases”).

these lawyers is an immense pyramid of cases, in only a few of which they can intervene. At the pyramid's broad base are homicide cases in death penalty states in which a prosecutor might decide to bring a capital charge.¹²⁶ Stacked on top of that layer are progressively narrower but still broad layers of cases. First comes a layer of cases in which defendants have been capitally charged but their trials may or may not eventuate in a capital conviction and, if they do, may or may not prompt a capital sentencing hearing. Second is a layer of cases in which death sentencing hearings *are* held, among which are many, hard-to-preselect cases that are unlikely to result in a death sentence no matter who the defense lawyer is. In the third layer are cases in which a death sentence has been imposed and a state direct appeal is about to occur that, again, in some hard-to-predetermine number of cases will result in reversal regardless of the quality of the lawyering.¹²⁷ Next come cases in which the appeal has been denied but state post-conviction relief is being sought. Above those layers are now relatively small groups of capital cases in which all potentially available state relief has been denied and in which only United States Supreme Court review on certiorari or, thereafter, federal habeas review remains to be tried. At the tip of the pyramid are capital cases in which the Supreme Court has granted review. As one moves up the pyramid, four things happen: (1) the pool of cases shrinks; (2) the defendant's access to state-compensated representation also shrinks or evaporates;¹²⁸ (3) the defendant gets closer and closer to

126. Prosecutors in death penalty states have more homicide cases per capita to choose from than those in noncapital states. See *Does Death Work?*, *Economist*, Dec. 10, 1994, at 27 (noting that (1) although most southern states have the death penalty, they also have higher murder rates; (2) Louisiana, a capital state, has the highest murder rate in the nation; and (3) among southern states, only Florida has a murder rate below the national average); Stephanie Salter, *Hold Executions for 'Closure' in a Stadium*, *S.F. Examiner*, May 2, 1999, at C11 ("In the 12 states that prohibit capital punishment, the murder rate is 3.5 per 100,000 population. In the 38 states that allow executions, the rate is . . . 6.6 per 100,000."); Liebman et al., *A Broken System*, *supra* note 81, at 43 (comparing population and homicide rates and concluding that "death-sentencing states account for about 76% of the nation's population and about 80% of its homicides").

127. Over 40% of the thousands of death sentences reviewed on direct appeal in the United States between 1973 and 1995 were overturned at that stage and never reached the state and federal post-conviction phases of review. See Liebman et al., *Capital Attrition*, *supra* note 81, at 1847.

128. Although indigent capital defendants have a constitutional right to state-compensated counsel at trial, see *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963), and on state direct appeals as of right, see *Douglas v. California*, 372 U.S. 353, 356-57 (1963); cf. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."), they have no such right nor any statutory right to state-compensated counsel in certiorari proceedings in the Supreme Court following direct appeal, see *Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974), or in most state post-conviction proceedings, see *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); see also Godbold, *supra* note 125, at 861 (discussing the absence in many states of any system for providing capital prisoners with counsel in state post-conviction proceedings); Lardent & Cohen, *supra* note 125, at 216-17 (discussing *Giarratano's* holding); Brad Snyder, Note, *Disparate Impact on Death Row: M.L.B. and the*

actual execution; and (4) it becomes easier for expert outsiders to intervene.¹²⁹

For these four reasons, cases at or near the top of the pyramid are the best use of the anti-death penalty bar's modest resources. And that, indeed, is where death penalty lawyers have targeted their efforts. In the late 1960s and early 1970s, they achieved a "moratorium" by securing Supreme Court review of cases raising "systemic" issues present in most or

Indigent's Right to Counsel at Capital State Postconviction Proceedings, 107 Yale L.J. 2211, 2236 n.198, 2237 n.204 (1998) (discussing effect of exceedingly low compensation for state post-conviction counsel in Georgia and Mississippi). Although there is no constitutional right to counsel in capital habeas corpus proceedings, see, e.g., *Oxford v. Delo*, 59 F.3d 741, 748 (8th Cir. 1995) (holding that federal habeas petitioner "had no constitutional right to the effective assistance of counsel in his post-conviction proceedings"); *Jenkins v. Gramley*, 8 F.3d 505, 508 (7th Cir. 1993) (noting that "the Constitution does not create any right to counsel in [state or federal] post-conviction proceedings"), Congress created a statutory right to federal habeas counsel in 1988, see 21 U.S.C. § 848(q)(4)(B) (1994); see also *McFarland v. Scott*, 512 U.S. 849, 854-57 (1994) (interpreting federal statute to establish a right on the part of indigent capital habeas petitioners to appointed counsel to assist in the preparation, filing, and litigation of their habeas petitions). By doing so, incidentally, Congress weakened somewhat the anti-death penalty bar's gap-filling justification for putting its private resources into federal habeas as opposed to state trial-level or post-trial representation.

129. Indicative of the difficulties outsider lawyers face in seeking appointments to represent indigent capital defendants at the trial level are a series of Georgia cases in which volunteer lawyers who had secured federal habeas relief for death row clients were at least temporarily prevented from representing the defendants on retrial as court-appointed counsel. See *Roberts v. State*, 438 S.E.2d 905, 906 (Ga. 1994) (noting that trial court refused to appoint out-of-state lawyer who had prompted retrial by securing federal habeas relief for defendant); *Birt v. State*, 387 S.E.2d 879, 879 (Ga. 1990) (noting that trial court ordered lawyer who represented defendant on a volunteer basis in prior habeas proceedings to continue representing defendant at retrial *pro bono publico*, without court appointment or compensation by the state); *Amadeo v. State*, 384 S.E.2d 181, 181-82 (Ga. 1989) (noting that trial court insisted on appointing local counsel to represent defendant on retrial, and permitted the volunteer lawyers who had represented him in habeas, and whose appointment he sought on retrial, to participate only at their own expense). At the beginning of the state post-conviction process, however, outsider lawyers face little or no competition from local lawyers, given the absence of a right to the appointment of counsel and to compensation at that stage. See *supra* note 128. Outsider lawyers face even less competition from local lawyers at the federal habeas stage given (1) the paucity of local lawyers with federal habeas experience or expertise, (2) federal judges' usual willingness to let petitioners select their own counsel, and (3) the federal judiciary's reliance on professional criteria and liberal *pro hac vice* policies when called upon to appoint federal habeas counsel (in contrast to the patronage considerations and strict *pro hac vice* restrictions that often apply at the state trial level in capital and other cases).

It is also easier to recruit experienced lawyers (especially big-firm lawyers) for state and federal post-conviction proceedings than for capital trials, because (1) there are more lawyers (especially big-firm lawyers) with the skills and experience needed to handle the kind of litigation typically encountered in "civil" post-conviction proceedings, see *infra* note 134 and accompanying text, and (2) unlike capital trial lawyers, who have to be psychologically prepared to make things drastically worse for their clients by playing midwife to their capital convictions and sentences, civil post-conviction lawyers almost literally *cannot* make things worse and (if only by keeping the litigation, and thus the client, alive) can only make things better.

all cases further down in the pyramid.¹³⁰ In the late 1970s and early 1980s, that strategy was supplemented (with the help of volunteer lawyers from large corporate firms in the nation's largest cities¹³¹) by an effort to cover *all* capital federal habeas cases. In the late 1980s, when systemic issues had dried up and the numbers reaching the federal habeas stage started to burgeon, the fort was temporarily held with the help of a set of "death penalty resource centers" that the state and federal governments briefly funded. Finally, in the mid-1990s and beyond, when the resource centers fell victim to the Gingrich Revolution, anti-death penalty lawyers were left to scramble as best they could to cover a portion of the habeas and Supreme Court cases.¹³²

As a result of this allocation of resources, several things happened. Pretrial, trial, and direct appellate proceedings were neglected.¹³³ Consequently, in its litigation, strategic thinking, and (importantly) training of nonmovement lawyers, the anti-death penalty bar focused mainly on the procedural issues that are fair game in habeas proceedings, not the substantive issues that are the staple of the earlier stages. The huge amount of opposing legal resources that the anti-death penalty bar attracts when

130. See Meltner, *supra* note 5, at 106–25 (detailing the development of the Fund's successful "moratorium" strategy).

131. See, e.g., Ann Woolner, Counsel Comes South to Test Fairness in Ga. Death Cases, *Fulton County Daily Rep.*, Oct. 18, 1999, at 1; *supra* note 84 (discussing Willis case); *infra* notes 245, 246 (discussing various cases).

132. See Roscoe C. Howard, Jr., The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel, 98 W. Va. L. Rev. 863, 906–07, 912–15, 919–20 (1996) (discussing the crucial function the resource centers played, especially in federal post-conviction representation of capital petitioners in the late 1980s and early 1990s, and the difficulties caused by the centers' defunding in the mid-1990s); Berlow, *Wrong Man*, *supra* note 84, at 84 ("In 1995 Congress weighed in on the need for speedier executions when it eliminated the \$20 million annual budget for Post-Conviction Defender Organizations, which had provided some of the most sophisticated and effective counsel for death-row inmates in twenty death-penalty states."). Characteristics of the stages at which anti-death penalty lawyers intervene help explain why they are a magnet for high levels of opposing resources. First, the later in the process the intervention occurs, the more likely it is that public attention will have begun to focus on the possibility of an execution, hence the more importance the state is likely to attach to going forward with the execution the anti-death penalty lawyers are attempting to stop. Second, high-intensity anti-death penalty litigation in the Supreme Court must be countered with at least equal effort by the lawyers for the states, else the results are likely to affect many more cases than the one at hand. Indeed, in nearly all cases, a grant of certiorari in a capital case not only involves the particular state in question in expensive Supreme Court litigation but also triggers one or more supporting amicus briefs from state attorneys general in *other* states. See, e.g., Brief Amicus Curiae on Behalf of 35 States, *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (No. 98-8384). Finally, the habeas corpus practice in which the anti-death penalty lawyers specialize is an expensive form of civil litigation at which the big-firm lawyers who assist the anti-death penalty lawyers are particularly adept. See *supra* note 131 and accompanying text; *infra* note 134 and accompanying text.

133. The main exception is retrials after anti-death penalty lawyers secure federal habeas relief for their clients, when those lawyers often either continue representing their clients or interest expert defense counsel in doing so. See, e.g., Georgia cases cited *supra* note 129. On capital defendants' high success rates on retrial, see *supra* notes 84, 124.

it intervenes followed those lawyers to the habeas and Supreme Court stages and were focused on *limiting* the procedural rights the death penalty lawyers were attempting to enforce. The pitched legal wars that all those resources funded also vastly protracted the post-conviction process, particularly given the *civil* setting of habeas litigation—complete with motions practice, discovery, evidentiary hearings, interlocutory appeals, extensive briefing, rehearing and other post-trial practice, appeals, and a constellation of satellite litigation over stays of execution, the right to (and to use *ex parte* proceedings to request) counsel, and the right to funds for experts and investigators.¹³⁴ Finally, the rate of reversals of capital convictions and sentences burgeoned, influenced by factors discussed below and also, to a lesser degree, by the competence and dedication of the movement lawyers and their volunteer big-firm colleagues and by the conviction of federal habeas judges, fueled most dramatically by eleventh-hour litigation over stays of execution (with direct lines kept open from the judge's chambers to the executioner's), that it was *those judges*—far more than jurors, trial judges, and governors—who had the responsibility to decide who would live and who would die.¹³⁵

At first blush, this sounds like success. And, indeed, the top-of-the-pyramid strategy seemed *so* successful that movement lawyers diverted into it whatever extra resources they could muster—including the donated time of big-firm lawyers and the death penalty resource centers—thus attracting still more opposing resources and putting still more

134. See 1 Liebman & Hertz, *supra* note 42, §§ 2.2, 6.3, 11.6–11.8, 12.2–13.6, 17.3, 19.2–20.1, 21.1; 2 *id.*, §§ 29.1–29.3, 34.1–39.2.

135. See Edward Lazarus, *Closed Chambers* 120 (Penguin Books 1999) (1998) (describing activity at Supreme Court upon receipt of applications for stays of imminent executions, during which clerks engage in “tense assessments and reassessments of an inmate’s final claims, frantic arguments with clerks in other Chambers over the merits of the case, and rounds of reluctant and stilted phone calls to a Justice’s home, often continuing past midnight, about where matters stood as the last grains of sand passed through someone’s hourglass”); Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1609–10 (1986) (discussing reviewing judges’ reaction to a sense of complicity in the state violence implied by capital sentences); Robert F. Utter, *Unjust Laws*, 19 *Cardozo L. Rev.* 1035, 1038 (1997) (describing decision by the author, a former state supreme court justice, to leave the Washington Supreme Court after it permitted the state to execute its first death row inmate since *Furman*); see also Ninth Circuit Judge John T. Noonan’s description of the last 36 hours of Robert Alton Harris’s life before his execution, during which a flurry of last-minute court filings resulted in the granting, then vacation, of several stays of execution:

The word [of the penultimate order vacating a stay] reached the warden at San Quentin at about 3:30 a.m. (PCT).

Harris was escorted into the gas chamber. His lawyer . . . made one more effort. He found a Ninth Circuit judge, Harry Pregerson, notable both for courage and magnanimity, who issued a new stay of execution at about 5:30 a.m. (PCT). Harris was removed from the chamber. At 6:00 a.m. the Supreme Court replied. . . . The horses of the night had galloped. Harris was put to death at 6:30 in the morning.

John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 *Stan. L. Rev.* 1011, 1017–20 (1993).

pressure on federal habeas judges to be the final arbiters of life and death.

2. *The Pro-Death Penalty Strategy: Full Steam Ahead.* — To see why the strategy, perhaps inevitably, backfired, consider now what was happening at the trial stage.

a. *The Offense.* — Consider “a generalized fact pattern often encountered in capital cases”:

An outsider only recently arrived in the community—often a rural or small-town community—is charged with taking the life of a local citizen. Typically, the outsider is young, poor, urban, male, and African American or Latino; if he is white, he is probably a drifter and probably has a criminal record in another State. The victim, on the other hand is probably white, a respected member of the community, most usually a merchant or law enforcement officer. The accused and the victim do not know each other; the latter had no particular reason to expect that the crime would occur as and when it did; in all likelihood, the homicide occurred in the course of some other serious felony, usually a robbery. The evidence against the accused seems strong.

Such an offense obviously will shock, frighten, and enrage the community. That of course is why the community reserves its most severe punishment for such offenses. But inherent in the “local spirit” aroused by such egregious crimes against the community at the hands, apparently, of someone so thoroughly outside the community is the temptation—indeed, at times, the compulsion—for the legal arm of that community to move more swiftly and directly toward that punishment than [the law] permits.¹³⁶

Enter now the “dedicated pro-death penalty forces”—police and prosecutors on whose shoulders falls the task of protecting the community and punishing the criminal. The impact on these actors of a crime such as this has been documented by Ken Armstrong and colleagues at the *Chicago Tribune*, Alan Berlow, Stephen Bright, and Samuel Gross and needs only to be summarized here.¹³⁷ Local law enforcement is under

136. 1 Liebman & Hertz, *supra* note 42, § 2.6, at 101–02.

137. See Bright & Keenan, *supra* note 115, at 759–816; Gross, *Lost Lives*, *supra* note 84, at 133–36; Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 *Buff. L. Rev.* 469, 475–79 (1996); Armstrong, *Cowboy Bob*, *supra* note 114; Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, *Chi. Trib.*, Nov. 15, 1999, at N1 [hereinafter Armstrong & Mills, *Inept Defenses*]; Armstrong & Mills, *Justice Derailed*, *supra* note 84; Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, *Chi. Trib.*, Jan. 14, 1999, at N1 [hereinafter Armstrong & Possley, *Break Rules*]; Ken Armstrong & Maurice Possley, *Reversal of Fortune*, *Chi. Trib.*, Jan. 13, 1999, at N1 [hereinafter Armstrong & Possley, *Reversal of Fortune*]; Armstrong & Possley, *Verdict Dishonor*, *supra* note 84; Berlow, *Wrong Man*, *supra* note 84; Mills & Armstrong, *Another Cleared*, *supra* note 84; Steve Mills & Ken Armstrong, *Convicted by a Hair*, *Chi. Trib.*, Nov. 18, 1999, at N1 [hereinafter Mills & Armstrong, *By a Hair*]; Steve Mills & Ken Armstrong, *The Inside Informant*, *Chi. Trib.*, Nov. 16, 1999, at N1 [hereinafter Mills & Armstrong,

tremendous pressure to solve the crime and punish the perpetrator, harshly.¹³⁸ If the sheriff and district attorney do so, they can run for of-

Inside Informant]; Steve Mills & Ken Armstrong, *A Tortured Path to Death Row*, Chi. Trib., Nov. 17, 1999, at N1 [hereinafter Mills & Armstrong, *Tortured Path*]; Steve Mills et al., *Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems*, Chi. Trib., June 11, 2000, at N1 [hereinafter Mills et al., *Flawed Trials*]; Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, Chi. Trib., Jan. 11, 1999, at N1 [hereinafter Possley & Armstrong, *Flip Side*]; Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, Chi. Trib., Jan. 12, 1999, at N1 [hereinafter Possley & Armstrong, *Prosecution on Trial*]; see also Schebeck et al., *supra* note 84, at 41–238 (discussing prosecutorial and other failings that contribute to the conviction of innocent defendants in capital and noncapital cases).

Much of the support for claims made here about the prosecution and defense of capital cases come from press reports, not scholarly works. There are four reasons for this choice of authority. First, for the reasons discussed below, which are themselves an important part of the problem addressed here, judicial opinions systematically under-report the incidence, nature, and effects of capital overcharging and sentencing. See *infra* notes 237–239 and accompanying text. Second and consequently, legal scholars, who typically rely on judicial opinions, are way behind investigative journalists, who use a wider variety of live and documentary sources, in documenting the problem discussed here and its results. Third, an assurance of accuracy on a par with that achieved by law review editing and cite-checking practices is provided by the controversial and often embarrassing nature of the journalists' findings, particularly in an era of wide public consensus on the need to be tough on crime, and by a combination of the consuming public's tastes, journalists' vulnerability to political attack, editorial ethics and discretion, and libel liability. Finally, and most importantly, a crucial prerequisite for any solution to the problem discussed here is a readiness on the part of voters and lawmakers disposed to be tough on crime to take the problem of the overproduction of death seriously. See *infra* notes 260–262, 264 and accompanying text. Evidence of concerted media attention to important aspects of the problem (be that attention the cause or consequence of public concern) is probably a better indication of that public readiness than is scholarly scrutiny.

138. See, e.g., Gross, *Lost Lives*, *supra* note 84, at 135 (“Death produces strong reactions—in this context, a desire to punish and to protect.”); Ken Armstrong & Steve Mills, *Death Row Conviction in Cop Death Overturned*, Chi. Trib., Jan. 28, 2000, at N1 [hereinafter Armstrong & Mills, *Conviction Overturned*] (discussing “pressure cooker[]” atmosphere and “high” emotions affecting police and prosecutorial tactics in Cook County cases involving police killings); Armstrong & Mills, *Justice Derailed*, *supra* note 84 (noting that the cases that tend to be charged capitally in Illinois are “so-called heater case[s], one[s] that newspapers and television stations prominently recount[],” including multiple-murder-victims cases (accounting for 37% of capital verdicts in Illinois since 1978), child killings (15%) and police killings (5%)); Mills & Armstrong, *By a Hair*, *supra* note 137 (criticizing Illinois prosecutors for capitally convicting Cecil Sutherland based on unreliable comparisons of human hair, dog hair, fibers, and tire-tracks that prosecutors described at trial as having “c[o]me from the defendant’s car,” when in fact the evidence only had characteristics that “could have” come from the defendant, or from many thousands of other people; authorities resorted to these tactics only after they for months “had been unable to unravel” the murder of a 10-year-old victim, “generat[ing] outrage among local residents and pressure on authorities to find the killer” and prompting the director of the state police to “vow[] that no expense would be spared in solving the case”); Possley & Armstrong, *Flip Side*, *supra* note 137 (quoting explanation of the Cook County trial judge who had the most convictions reversed during the 1977–1998 period due to prosecutorial misconduct (17 out of 207), that “[m]ost of the reversals involved death penalty cases” and “very brutal murders,” which led “aggressive” prosecutors to become “inflamed”); Rosenberg, *supra* note 114, at 21–23 (explaining Philadelphia district

office on their success; if they *fail*, they risk being run out of office at the next election.¹³⁹ This often means that the more death sentences a local

attorney Lynne Abraham's self-confessedly "passionate" commitment to capital punishment as demanded by her constituents (three-fourths of whom vote for her) in "a law-and-order city where politicians like Frank Rizzo could thrive"; although Abraham does not believe the death penalty deters crime, she seeks it more often, per homicide, than any other prosecutor in the nation because it gives citizens "the *feeling* of control demanded by a city in decay": "'We feel our lives are not in our own hands. . . . This is Bosnia.'"; David Kohn, 48 Hours: Impossible Mission (CBS television broadcast, Nov. 1, 1999) (transcript on file with the *Columbia Law Review*) (reporting on pro bono efforts of five prominent private investigators (former law enforcement officials and death penalty supporters) to show that Florida death row inmate Crossley Green is innocent, efforts prompted by what one of the private investigators describes as a "systematic . . . problem we have with the death penalty [in] this country" that causes police and prosecutors to "rush to judgment to convict people and punish them . . . to ease the tension in the community" that brutal killings generate); *infra* note 143. Some procedures that District Attorneys use to make capital charging decisions greatly increase the pressure on them to bring capital charges and to make the charges stick. See Richard Willing, Prosecutor Often Determines Which Way a Case Will Go, *USA Today*, Dec. 20, 1999, at 6A [hereinafter Willing, Prosecutor Determines] (comparing Oklahoma City's Robert Macy, "known for pursuing the death penalty aggressively," who bases his capital-charging decision on his opinion of the "ferocity" of the murder, formed while "visit[ing] the murder scene shortly after the crime is discovered," to low-death-sentencing prosecutors in Austin and Jacksonville, who forbear bringing capital charges until a committee of assistants reviews the case and makes a recommendation).

139. See, e.g., Bowers, *supra* note 114, at 1076-77 (listing factors that Florida capital prosecutors, judges, and defense lawyers believe affect prosecutorial decisions whether to bring a capital charge and whether to take such a charge to trial rather than accepting a noncapital plea, including pressure from the police, media coverage, public opinion, and the political and racial climate); Lefstein, *supra* note 114, at 511-12 (reporting statements by Indiana capital prosecutors in confidential interviews that "a prosecutor does not want to risk losing [a capital case] because that generates negative publicity and is seen as 'a knock on the prosecutor'"; because "'winning is quite important to the prosecutor'"; and because "it is not 'good politics' for prosecutors to lose death penalty cases"); Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 *Buff. L. Rev.* 329, 332-33, 396 n.323 (1995) (arguing that in "a death penalty system . . . administered at the local level by popularly-elected prosecutors and judges . . . [t]he fear of voter backlash from an electorate that overwhelmingly supports the death penalty colors the way in which discretion is exercised by the central decision-makers in the capital punishment system" (citing various examples)); Berlow, *Wrong Man*, *supra* note 84, at 78 (describing political gains reaped by elected officials who portrayed themselves as "'tougher' with respect to the death penalty than their opponents"); Bob Herbert, *The Wrong Man*, *N.Y. Times*, Mar. 2, 2000, at A27 (criticizing Brooklyn, New York, district attorney for (unsuccessfully) trying an innocent man for the capital murder of a popular storekeeper and leaving the "real killer . . . at large"); Michael Janofsky, *Prosecutor in the Ramsey Case Says He Plans to Leave Office*, *N.Y. Times*, Mar. 10, 2000, at A12 (discussing possible effect of Boulder, Colorado, district attorney Alex Hunter's three-year failure to indict anyone for the notorious killing of JonBenet Ramsey on Hunter's decision not to seek election to an eighth four-year term); *Nightline: Crime and Punishment, A Matter of Life and Death* (ABC television broadcast, Sept. 13, 2000) (transcript on file with the *Columbia Law Review*) (replaying political campaign advertisements by district attorneys seeking votes based on the number of men they caused to be executed or to be sentenced to die); Possley & Armstrong, *Prosecution on Trial*, *supra* note 137 (suggesting that district attorney's failure for 13 months to solve "a 'heater' [capital murder] case," i.e., one "in

prosecutor can obtain, the more votes he will get.¹⁴⁰ And as Felix Frank-

which the political stakes are high," contributed to his defeat at the polls in the next election and increased pressure on police to solve the case); Rosenberg, *supra* note 114, at 46 (noting that in 1994, the Democratic candidate for Pennsylvania governor, Mark Singel, moved "overnight" from a seven point lead in the polls to losing the election by five points after it was made public that an inmate named McFadden, who was released while the candidate was head of the state's parole board, had committed a series of violent offenses in New York: "All prosecutors and judges have hundreds of potential McFaddens lurking in their pasts; Singel[] . . . [looked for] cases . . . [where his opponent, Tom] Ridge, a former prosecutor, had taken anything short of the toughest stance. There is only one way to be safe: Always take the most hard-line position possible"; unsurprisingly, in Ridge's first seven months in office, he signed 15 death warrants, more than any of his predecessors had signed in their full terms in office). For examples of "humiliating failure[s]" to solve brutal murders that eventually led police and prosecutors to manufacture evidence against innocent capital defendants, see *infra* note 143; see also Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 *Fordham Urb. L.J.* 239, 240, 266-68, 270-73 (1994) [hereinafter, Symposium] (giving examples of savage and "grizzly" political attacks on candidates for public office based on their conscientious opposition to, or even just their failure in particular instances to take the hardest possible line in favor of, the death penalty, and claiming that "it is becoming more and more difficult" for elected state judges to "survive [politically] if they sometimes overturn death sentences"); *infra* notes 195-199 and accompanying text (detailing political pressures on judges who preside over capital cases).

140. See, e.g., Armstrong, *Cowboy Bob*, *supra* note 114 (discussing Oklahoma City district attorney Robert Macy; quoted *infra* text accompanying note 173); Rosenberg, *supra* note 114, at 23-24 (noting, in explaining Philadelphia district attorney's practice of seeking the death penalty in 85% of homicide cases that, "since crime became a hot public issue in the late 1960's, Philadelphia has had a series of . . . media-savvy, ambitious District Attorneys—including Senator Arlen Specter and Mayor Ed Rendell—who have . . . learned that aggressiveness is rewarded", creating an ethic in which leniency in capital cases is so embarrassing that the chief of the appellate division of Philadelphia's public defender office could think of only one prosecutor in Abraham's office who had taken less than the "toughest stance" and had "shown personal humanity" in charging potentially capital defendant; the public defender refused to name the responsible prosecutor, explaining that "to say someone's humane might get them into trouble"); *id.* at 46 ("Its political value is the unstated dark side to prosecutors' argument that they use the death penalty because their public demands it. One thing the most fervent district attorneys share is political ambition." (giving a variety of examples in Illinois, Louisiana, and Pennsylvania)); Willing & Fields, *supra* note 114 (giving examples of prosecutors such as Robert Macy of Oklahoma City who seek and obtain far more death sentences than their counterparts in neighboring jurisdictions and "campaign[] for re-election on . . . success in prosecuting killers"; quoting Jacksonville, Florida, prosecutor Harry Shorstein, explaining that "local political pressure cannot be discounted: 'If you've got a jury that's tough enough and a judge that's up for re-election, then all it takes is a demagogue.'"). In Eric Zorn's view, in a column discussing the record of former Cook County state's attorney and current Chicago mayor Richard M. Daley:

The number of innocent men Daley's deputies were striving to execute in the 1980s—a number almost certain to be greater than [the then current] six when the courts are finally through reviewing those . . . says a lot about the perils of mixing politics with justice and . . . allowing the position of state's attorney or attorney general ever to be a steppingstone or holding area for those with great ambition but modest legal credentials.

Zorn, *Daley's Oversight*, *supra* note 114. As Zorn predicted, the number of death row inmates tried by Daley's staff who later were shown to be innocent rose to seven just two

furter noted, “[w]hen life is at hazard in a trial, it sensationalises the whole thing almost unwittingly; the effect . . . [is] very bad.”¹⁴¹

b. *The Investigation.* — Nor is there a dearth of investigative corners to cut when needed to get capital convictions and sentences¹⁴²—some

months later. See Mills & Armstrong, *Another Cleared*, supra note 84.

141. Felix Frankfurter, *Of Law and Men* 81 (1956), quoted in Gross, *Lost Lives*, supra note 84, at 129.

142. See Gross, *Lost Lives*, supra note 84, at 135. Gross notes:

[T]he pressure to solve homicides . . . can . . . produce mistakes. If the murder cannot be readily solved, the police may be tempted to cut corners, to jump to conclusions, and—if they believe they have the killer—perhaps to manufacture evidence to clinch the case. The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying and to the extent that it attracts public attention—factors that also increase the likelihood that the murder will be treated as a capital case.

Id.; see also Armstrong & Mills, *Conviction Overturned*, supra note 138 (discussing decision of Illinois Supreme Court in January 2000 overturning capital conviction despite “overwhelming” evidence that defendant killed a police officer: “[c]ases involving the murder of a police officer tend to be pressure cookers, where emotions run high,” and “include several where the Illinois Supreme Court later concluded that police and prosecutors engaged in overzealous tactics to convict and condemn the defendant”); Armstrong & Mills, *Justice Derailed*, supra note 84 (reporting on detailed study of all 285 death sentences in Illinois between *Furman* and November 1999, which found that 40% were achieved using (1) an appointed defense attorney “who has been disbarred or suspended,” (2) testimony of a jailhouse informant, (3) “notoriously imprecise” forensic evidence based on “visual comparisons of hairs,” or (4) all-white juries trying a black defendant for an offense against a white victim; “[s]ometimes, all of the elements appear in a single case,” including that of “Dennis Williams, who is black, [and] was sentenced to die by an all-white Cook County jury; prosecuted with evidence that included a jailhouse informant and hair comparison; and defended, none too well, by an attorney who was later disbarred”; Williams was released as innocent in 1996 after serving 18 years, most of them on death row); Mills et al., *Flawed Trials*, supra note 137 (reporting similar findings from a study of the 131 Texas cases leading to executions during George W. Bush’s tenure as governor: 43 of the defendants were represented by attorneys “who had been or [were] later disbarred, suspended or otherwise sanctioned for misconduct,” 40 were represented by attorneys who “presented no evidence whatsoever or only one witness during the trial’s sentencing phase,” 23 were convicted based at least partly on visual hair analysis, “a kind of evidence so inexact that it is restricted or barred in some jurisdictions,” 23 were convicted based at least partly on testimony of jailhouse informants, and 29 were sentenced to die based at least partly on a psychiatrist’s predictions of future dangerousness, a form of testimony that “the [American] Psychiatric Association has condemned . . . as unethical and untrustworthy”; discussing David Wayne Stoker’s case “illustrat[ing] many of the problems in Texas’s death penalty system,” including: (1) an absence (in the police chief’s words) of any “‘direct tie’ between Stoker and the crime”; (2) a decision to go to trial with such a small amount of evidence that the police chief admitted being “really surprised we did what we did with [it]”; (3) crucial testimony against Stoker by a paid informer in return for dropped charges and \$1000, about which the informant and the state investigator who paid him were permitted to lie at trial; (4) representation by one attorney who “surrendered his law license less than two years after Stoker’s trial and pleaded guilty to criminal charges” for forging signatures of clients on checks and of a judge on a falsified court order, and by a second attorney who was less than a year at the bar; (5) witness allegations of prosecutorial pressure to testify falsely; (6) possibly planted physical evidence; (7) compromised future-dangerousness testimony; (8) and nagging doubts

peculiar to homicide cases, and especially capital ones;¹⁴³ others as available there as in criminal cases not involving homicides.¹⁴⁴ Often, suspi-

about Stoker's guilt).

143. After a painstaking analysis, marshaling substantial statistical and impressionistic evidence, Professor Gross concludes that "[t]he steady stream of errors we see in cases in which defendants are sentenced to death is a predictable consequence of our system of investigating and prosecuting capital murder." Gross, *Lost Lives*, supra note 84, at 149. The "extraordinary amount of attention" the public and public servants give to capital cases and their highly publicized nature "generate[] many more mistakes than would occur if capital murders were handled as casually as run-of-the-mill robberies and assaults," thus placing a heavy burden on the system thereafter to "correct[] deadly judicial errors." *Id.* at 127-28; see also Scheck et al., supra note 84, at 266 app.2 (reporting that 46% of the DNA-induced exonerations during the 1990s occurred in cases involving a sentence of death or life in prison); Gross, *Lost Lives*, supra note 84, at 132 (noting that, although murder cases account for only about 7% of all convictions of violent felonies, they account for 45% of all demonstrated "miscarriages of justice" (i.e., convictions of demonstrably innocent defendants); likewise, capital murder cases account for only about 0.2% of all violent felony convictions but 12% of all demonstrated miscarriages of justice); Possley & Armstrong, *Flip Side*, supra note 137 (reporting that nearly half of the 207 Cook County, Illinois, convictions that courts reversed between the end of 1977 and the end of 1998 based on prosecutorial misconduct were homicide convictions; eight of the reversals were in capital cases; on retrial, six of the eight previously capital cases resulted in non-death sentences). See generally Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in *America's Experiment with Capital Punishment: Reflections on the Past, Present and Future of the Ultimate Penal Sanction* 417, 424-25 (James R. Acker et al. eds., 1998) (citing studies showing that cases of capital defendants "are more likely than those of defendants not facing execution to have been infected by distortions arising from racism, the incompetence of defense counsel, their own mental limitations, public passion, political pressures, or jury prejudice or confusion," prompting "a dangerous increase in the risk that the system will make a fatal error").

For examples of cases in which the pressure to solve a murder led, or encouraged, law enforcement officials to secure a death sentence via manufactured evidence, see Gross, *Lost Lives*, supra note 84, at 135-36 ("[u]nder intense pressure" following their "humiliating public failure" to solve the "stunning[ly] brutal[]" 1983 rape-murder of a 10-year-old girl, Naperville, Illinois, police "manufactured evidence to convince prosecutors" that Rolando Cruz and Alejandro Hernandez had committed the offense; Cruz was later acquitted and both were released after police admitted they lied); *id.* at 136 n.52 (discussing false capital conviction of Walter McMillian in 1987 that police in Monroeville, Alabama, "manufacture[d] . . . out of whole cloth"—pressuring a defendant in an unrelated, potentially capital murder case to implicate McMillian falsely—after an "eight-month investigation [had] turned up no leads" and "no suspects"); *infra* note 145 (discussing the Rolando Cruz case); *infra* note 151 (discussing the Earl Washington case).

144. See Gross, *Lost Lives*, supra note 84, at 129. Mistakes can have a variety of effects; convicting and condemning the innocent is only the most dramatic:

A [capital] conviction can be "wrong" in many ways. It might be excessive—for example, if the defendant is really guilty of second-degree murder but was convicted of first-degree murder; or the jury might have been right to conclude that the defendant committed the fatal act, but wrong to reject a defense of insanity or self-defense; or a conviction that is factually accurate might have been obtained in violation of the defendant's constitutional rights.

Id. A capital judgment also is wrong if the offense, although first-degree murder, was not accompanied by the level of culpability or the kind of aggravating circumstance required by state law or the Eighth Amendment to make the offense death-eligible. See *Maynard v. Cartwright*, 486 U.S. 356, 360 (1988) (overturning a death sentence based on an

cion focuses immediately on a single suspect meeting something like the profile described above. At this point, the effort can stop being a search for stronger suspects and become that of pinning the offense on the one who already has appeared.¹⁴⁵ The absence of both the victim and eyewit-

unconstitutionally vague aggravating circumstance that did not sufficiently narrow the category of death-eligible murders); *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (reversing a death sentence imposed on an accomplice to a robbery that resulted in a killing because the defendant did not intend or contemplate that a killing would occur and thus did not have the level of culpability required by the Eighth Amendment). Similarly, a capital sentence may be said to be wrong if mitigating circumstances outweigh aggravating ones, as the Court found, or at least suggested was the case, in, e.g., *Parker v. Dugger*, 498 U.S. 308, 321–22 (1991) (concluding that nonstatutory mitigating circumstances may have been sufficient to outweigh aggravating circumstances and thus to rule out a capital sentence) and *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1981) (vacating a capital sentence because the trial judge improperly refused, as a matter of law, to consider what the Court thought was compelling mitigating evidence of defendant's abuse as a child). See generally *infra* note 237 (discussing underinclusiveness of innocence-focused measures of miscarriages of justice in capital cases).

A good example of alleged corner-cutting to inflate the offense from murder to capital murder and secure a death sentence is Philip Workman's Tennessee case. Workman admitted robbing a north Memphis fast food store and shooting in the direction of pursuing police officers, one of whom died of a single gunshot wound. If Workman fired the fatal shot, his offense was capital murder; if one of the other pursuing officers fired the shot, the offense was noncapital murder. At Workman's 1982 trial, Harold Davis testified that he saw Workman fire the fatal shot, the state's ballistics evidence was consistent with that theory, and Workman's lawyers accordingly admitted that he fired the shot and pleaded drug impairment. In late 1999 and early 2000, however, Davis recanted his eyewitness account, claiming that police pressured him into saying he saw the shooting. Then, the state (inadvertently, it seems, in a passing remark in an affidavit filed in opposition to a clemency petition) disclosed the existence of long-suppressed x-rays of the victim which disproved the only theory on which the state could base its claim that Workman's pistol and bullets caused the exit wound, namely, that the bullet fragmented inside the victim's body before only one piece of it made the exit wound. See Jon Yates, *Five Jurors Say Workman Needs a Second Trial*, *Tennessean*, Mar. 13, 2000, at 1A; see also *Workman v. Bell*, 2000 WL 1253760, at *1 (6th Cir. Sept. 5, 2000) (en banc) (splitting evenly over question whether state's reliance on fragmented-bullet theory while suppressing evidence that the bullet did not fragment constitutes "fraud on the court" sufficient to justify reopening the prior denial of habeas relief which was premised in part on the fragmented-bullet theory).

145. Shoddy police work based on premature conjecture is tragically illustrated by Kerry Max Cook's case. After Linda Jo Edwards was killed in a brutal rape-mutilation-murder, suspicion momentarily focused on James Mayfield, a respected university librarian with whom the 22-year-old victim had carried on a lengthy relationship until a breakup a few weeks earlier. After Mayfield denied any part in the killing, claiming he had not had sex with Edwards for weeks, and giving an alibi, the police arrested Cook, a bisexual petty criminal living in the same apartment complex with Edwards whose fingerprint was found on her screen door. The police then "coerced" an expert to testify—falsely, he admitted, years later—that the fingerprint was less than 12 hours old (something forensic science cannot discern), found a jailhouse informant nicknamed "Shyster" to say Cook confessed the crime to him (Shyster later recanted), and prevailed on an eyewitness to change her story from having seen Mayfield to having seen Cook in Edwards' apartment just before the killing. After three trials, three death sentences, three reversals on procedural grounds, 20 years on death row, and repeated sexual abuse of Cook in prison, his fourth retrial ended with a plea bargain for time served. Two years after convincing Cook to accept that deal,

the prosecutor revealed that he had conducted DNA tests on semen-stained clothes of the victim (which police had previously maintained had been lost before trial), learning (1) that Cook could not have been the source of the semen (something the prosecutor evidently knew but did not disclose when he proposed the plea bargain), and (2) that the semen matched Mayfield's. See Moore, *supra* note 84.

For other cases, see, e.g., *Strickler v. Greene*, 527 U.S. 263, 273–75 & n.5 (1999) (describing how police helped mold key eyewitness's initially "vague" and "sometimes muddled memories" of what and whom she had seen, as reflected in statements withheld from the defense, into her testimony in "great detail" at trial about seeing a man she could now confidently identify as the defendant abduct the victim near a shopping center); *Kyles v. Whitley*, 514 U.S. 419, 423–29, 432, 441–49 (1995) (granting habeas relief from capital conviction because, in investigating robbery-murder of supermarket customer in store's parking lot, New Orleans police (1) accepted the word of a longtime criminal and police informant named Beanie, whom police found in possession of the victim's car, that Curtis Kyles had sold him the car, while suppressing a variety of statements by Beanie that were inculpatory, self-contradictory, and inconsistent with Beanie's trial testimony, and revealed a course of dealing between Beanie and the police that cast serious doubt on the investigation; then (2) manipulated eyewitnesses into identifying Kyles at trial, inconsistently with their initial but thereafter suppressed descriptions that much more closely matched Beanie; a majority of jurors in three successive retrials voted to acquit Kyles, whom prosecutors finally released, see Death Penalty Information Center, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*, July 1997 (visited Aug. 10, 2000) <<http://www.deathpenaltyinfo.org/inn.html>> [hereinafter DPIC]); *Banks v. Reynolds*, 54 F.3d 1508, 1510–11, 1517–18 (10th Cir. 1995) (granting habeas relief because the prosecution suppressed evidence that at least three other men were previously arrested for the crime with which petitioner was charged, that two of them had been positively identified by eyewitnesses, and that the cellmate of one of the previously arrested suspects claimed that suspect had confessed to the crime); *Monroe v. Blackburn*, 748 F.2d 958, 960 (5th Cir. 1984) (granting habeas relief because the state failed to disclose that police obtained information after trial that someone other than petitioner may have committed the capital murder); *Chaney v. Brown*, 730 F.2d 1334, 1351–53 (10th Cir. 1984) (granting habeas relief because the prosecution suppressed evidence that might have led the jury to believe that the capital sentenced petitioner did not commit the killing); 1 *Liebman & Hertz*, *supra* note 42, § 11.2c, at 457–58 (discussing unpublished decision in *Miller and Jent v. Wainwright*, Nos. 86-98-Civ.-T-13 and 85-1910-Civ.-T-13 (M.D. Fla. Nov. 13, 1987), granting habeas relief because the prosecutor exhibited "callous and deliberate disregard for . . . truth" by suppressing police reports identifying numerous witnesses who were fishing at the location where the victim's body was found at the only time the two capital sentenced petitioners (who had an otherwise airtight alibi defense) could have deposited the victim's body and who saw nothing amiss; the defendants thereafter were released and subsequently were compensated by the Pasco County Sheriff's Department for damages arising from official misfeasance, see DPIC, *supra*, app.); Gross, *Lost Lives*, *supra* note 84, at 137 (quoted *supra* note 142); Sasha Abramsky, *Trial by Torture*, *Mother Jones* (wire edition) (Mar. 3, 2000) <http://www.motherjones.com/news_wire/chicops.html> (quoting former head of the Chicago Police Department, Richard Brzeczczek, describing the motivating assumptions that led Chicago police officers during the 1980s to arrest suspects—typically ones who were, "to put it mildly, no saint[s]"—then to cut corners to prove them guilty: either "we know he did it, but we have to circumvent these goofy rules of due process, either by lying or fabricating evidence, whatever it takes to convict this person" or "'even though [we know he] didn't commit the offense . . . it's OK, because he's going to do the time for all the crimes he didn't get caught for'"); Balestier, *supra* note 84 (quoting statement to press of Ft. Stockton, Texas prosecutor at time of Ernest Ray Willis's conviction and death sentence for an arson-murder to which another death row inmate subsequently confessed, that

ness testimony that helps police solve most nonhomicide crimes, and the preexisting relationship between killer and victim that helps them solve most noncapital homicides,¹⁴⁶ makes it easier than otherwise for police

"[w]e were very surprised" and "tickled pink" about "even [getting a conviction]," the "chances [of which] were about 10% going into it," given that "[w]e didn't have any eyewitnesses . . . [or] know what type of flammable material was used," and "[i]t was all circumstantial material"; a Texas trial judge subsequently overturned Willis's conviction due to ineffective representation and prosecutorial suppression of (1) a psychological report the state had commissioned, which concluded that "this was [not] a good death penalty case" and (2) the fact that jailers involuntarily medicated Willis during trial with "massive doses of anti-psychotic drugs"); Berlow, *Wrong Man*, supra note 84, at 66–67 (offering two theories to explain "[w]hy prosecutors were so zealous in their pursuit of [Rolando] Cruz," who subsequently was released from death row after 10 years based on DNA evidence showing that another man, who had previously confessed to the crime, had indeed committed it: first, "there was enormous public and political pressure on the state attorney's office to solve the highly publicized Nicarico case," a brutal rape-murder of a 10-year-old girl; second, "it is quite possible that the police and prosecutors became convinced of Cruz's guilt before they had accumulated the facts to prove it, and then stuck with their hunch," which they initially based on Cruz's attempt to provide false information in order to collect a \$10,000 reward, but on no physical evidence, "even as the holes in their case multiplied"; concluding that, "[s]hort of unimpeachable exculpatory evidence, prosecutors are loath to back away from an indictment, much less a conviction"); Herbert, supra note 139 (describing how Brooklyn, New York, police officers focused on rap singer Antwine Butts as the perpetrator of a killing of a popular storekeeper and a teenage employee in an apparently botched robbery despite Butts's strong alibi witnesses, then built a capital murder case against him using the testimony of two witnesses, one of whom claimed she "had just happened to be passing by when the murders occurred, saw Mr. Butts and decided, on the spot, to accompany one or two other men who she said were involved," and also just happened to be present at a meeting the day before at which the witness said the killing was planned; the other witness was "a criminal with a long record" who admitted "that in the 12 to 24 hours leading up to the crime he had been smashed out of his mind on crack cocaine, marijuana and alcohol," that his "mind wasn't there," and that he "can't remember people. How am I going to remember time?"; Butts was acquitted); Paul McKay, *Brandley's Charges Dropped After Ruling*, *Hous. Chron.*, Oct. 2, 1990, at A1 (discussing prosecutor's decision to drop charges against death row inmate Clarence Lee Brandley after state courts reversed his conviction at a trial the courts said "lacked the rudiments" of fairness and was based on a "police investigation [that] took on a 'blind focus' aimed at convicting Brandley rather than finding the killer"); Mills et al., *Flawed Trials*, supra note 137 (describing Stoker case, which is discussed supra note 137); see also Frontline, supra note 84, at 9–10, 12–13, 24 (providing apparent examples, and expert confirmation, of tendency of law enforcement officials, once having settled upon a suspect and a theory of the offense, to defend their case against the suspect even after the theory collapses, including by proposing alternative theories that they did not advance at trial and that are contradicted by evidence that was introduced or was in the officials' files).

Although it might seem efficient for police to limit their efforts to proving the guilt of the first suspect against whom they have significant evidence, even if the evidence is not initially sufficient to convict (e.g., because some of it is inadmissible at trial), doing so will often produce error. See U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, xxviii (1996) [hereinafter *Exonerated by Science*] (noting that DNA analyses established that 2012 (or 25%) of the 8048 "primary suspects" in rape and rape-murder cases referred to the FBI for DNA testing between 1995 and 1998 were innocent).

146. See Gross, *Lost Lives*, supra note 84, at 127 (reporting data demonstrating that "[i]n most homicides, the killer was known to the victim . . . mak[ing] most homicides easy

and prosecutors to rely on evidence that is inaccurate or false.¹⁴⁷ Such evidence often takes the form of (1) the testimony of people who themselves are implicated in the crime and face death if they can't shift or moderate the blame,¹⁴⁸ or of jailhouse informants lured by attractive plea

to solve," but that capital murders are typically more difficult to solve because they are so much more likely to involve killings by a stranger).

147. Professor Gross states:

But killers must be pursued, and, in the absence of eyewitness evidence, the police are forced to rely on evidence from other sources: accomplices; jail-house snitches and other underworld figures; and confessions from the defendants themselves. Not surprisingly, perjury by a prosecution witness is the most common type of evidence that produces erroneous capital convictions, and coerced or otherwise false confessions are the third most common cause.

Id. at 137 (citing data from Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21, 57 (1987)). Cf. Gross, *Lost Lives*, supra note 84, at 136–37 (although 52% of wrongful convictions, in a study of criminal cases generally, were attributable to faulty eyewitness identification (citing Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 *Law & Hum. Behav.* 283, 291 (1988)), only 16% of miscarriages in murder cases stem from that defect, according to Bedau & Radelet, supra, at 57, 61 n.184).

148. See Gross, *Lost Lives*, supra note 84, at 138 ("The threat of death can be a powerful motivator [to lie] when [the threat] is concrete," as when "the police seem to be closing in."); see, e.g., *Kyles*, 514 U.S. at 445–49, 454 (overturning capital conviction based on evidence, suppressed by the police, suggesting that key witness against petitioner had himself committed the capital offense; on retrial, charges against Kyles were eventually dropped, see supra note 145); *Carriger v. Stewart*, 132 F.3d 463, 465, 471 (9th Cir. 1997) (en banc) (granting habeas relief due to prosecutor's failure to disclose information in state's files showing that prosecution's central witness—who later confessed to the murder he successfully pinned on petitioner at trial—had a "long history" of violent crimes and assaultive acts and "of lying to police and shifting blame to others"; Carriger was subsequently released after the county attorney declined to retry him, citing a lack of evidence of guilt, see Gross, *Lost Lives*, supra note 84, at 139–40; Noel Levy, *Decision Not to Retry Inmate Carefully Made*, *Ariz. Republic*, May 26, 1999, at B9); *Brown v. Wainwright*, 785 F.2d 1457, 1464–66 (11th Cir. 1986) (granting habeas relief because state officials deliberately withheld fact that chief witness against Brown lied on the stand about not having been granted leniency in return for testifying against Brown; Brown was released from prison after the charges against him were dropped, see DPIC, supra note 145); Gross, *Lost Lives*, supra note 84, at 136 n.52 (discussing the *McMillian* case); Associated Press, *Inmate Freed After 5 Years on Death Row*, *N.Y. Times*, Sept. 12, 1994, at A11 (describing release of Joseph Burrows from Illinois's death row after five years when the principal witnesses against him recanted their testimony and one confessed to the crime); John Hinton, *Rivera Is Acquitted in Two Killings*, *Winston-Salem J.*, Nov. 23, 1999, at A1 (describing acquittal of Alfred Rivera, who spent two years on North Carolina's death row for killing two men; the state supreme court ordered a new trial because the trial court improperly forbade Rivera to adduce evidence, supported by additional testimony at retrial, that one of Rivera's three codefendants, all of whom pleaded to lesser offenses in return for testifying against Rivera, had deliberately framed him); Zorn, *Daley's Oversight*, supra note 114 (discussing Illinois capital murder trial of William Franklin at which "[p]rosecutors told jurors . . . that the star witness to the murder was a bystander when in fact he was an accomplice"). Police pressure to make statements helpful to the state's case is not limited to those who are themselves charged with a capital crime. See, e.g., *Guerra v. Johnson*, 90 F.3d 1075, 1078–79 (5th Cir. 1996) (finding that police and prosecutors "intimidated" two eyewitnesses, one who initially said that petitioner's companion fired the fatal shots and one who had said she did not see the shooter but saw petitioner with his

bargaining and sentencing benefits,¹⁴⁹ and publicity hounds seeking the

empty hands on the hood of a car immediately after the shots were heard, into corroborating the prosecution's theory that the petitioner fired the shots; police told one witness that her common-law husband was at risk of parole revocation if she did not cooperate and told the other witness that her infant daughter could be taken from her if she refused to cooperate).

149. See *Mills & Armstrong, Another Cleared*, supra note 84 ("Although prosecutors use such witnesses regularly, jailhouse informants are considered among the least reliable witnesses in the criminal justice system. Such witnesses typically say another inmate confessed to them. In exchange, jailhouse informants frequently receive a variety of benefits, such as having pending criminal charges dropped or sentences reduced."). For examples of the use of jailhouse informants to secure faulty convictions generally, see, e.g., Bill Moushey, *Selling Lies*, *Pitt. Post-Gazette*, Nov. 30, 1998, at A1 (documenting efforts by inmates, sometimes with the knowing complicity of law enforcement officials, to "jump on the bus," i.e., to concoct perjured testimony and "sell" it to prosecutors in exchange for reduced sentences).

"[I]f the witness is lying to get favors unrelated to the crime at issue, he will do much better if it is a big case, which usually means a murder, or better yet, a capital murder." Gross, *Lost Lives*, supra note 84, at 138. For examples of the use of jailhouse informants to secure faulty convictions in capital cases, see, e.g., *Crivens v. Roth*, 172 F.3d 991, 998 (7th Cir. 1999) (overturning conviction because the prosecutor improperly failed to disclose that its key eyewitness had a criminal history and had used an alias in past, thereby "demonstrat[ing] a propensity to lie to police officers, prosecutors, and even judges"); *Scheck et al.*, supra note 84, at 156 ("Because of tales told by jailhouse snitches, Ron Williamson was nearly [executed] by the state of Oklahoma and Dennis Fritz was imprisoned for twelve years. So were thirteen other men ultimately freed through DNA exonerations, some 21% of the [Cardozo Law School's] Innocence Project [exoneration] cases [between 1988 and 1999]."); Gross, *Lost Lives*, supra note 84, at 136 n.52 (describing police pressure put on one Myers, who was under arrest for an unrelated murder, to implicate Walter McMillian in a killing McMillian did not commit but for which "he spent six years on death row before the frame-up was exposed"); *Armstrong & Mills, Justice Derailed*, supra note 84 ("In at least 46 cases [of the total 285] where a defendant was sentenced to die [in Illinois since 1977], the prosecution's evidence included a jailhouse informant"); Berlow, *Wrong Man*, supra note 84, at 77 ("One troublesome and increasingly frequent source of perjured testimony [in capital cases] is the 'jailhouse snitch'—the convicted felon who will testify to just about anything for the prosecution in exchange for a reduced sentence."); Liz Chandler, *Jury Ruled Death for Innocent Man, Mistakes in Case Expose System's Vulnerabilities*, *Charlotte Observer*, Sept. 10, 2000, at 12A (reporting on role played by jailhouse informant Timothy Hall in the capital conviction of Charles Munsey, who was later shown to be innocent; Hall was permitted to testify that Munsey confessed to him when both were incarcerated in Central Prison, even though the prosecutor had records in his file showing that Hall "had never been to Central Prison"; Munsey died of lung cancer in jail before he could be released following the actual killer's confession to the offense); Athelia Knight, *Blinded by the Light*, *Wash. Post*, Oct. 6, 1999, at C1 (describing release of Ellen Reasonover, who served 16 years in prison in Missouri for capital murder, after it was discovered that police suppressed (1) information about benefits the two jailhouse informants, whose testimony at her capital trial sealed her conviction, had received in return for their testimony; and (2) tapes secretly recording conversations between one of those informants and Reasonover, and between Reasonover and another cellmate, in which she consistently maintained her innocence); *Mills & Armstrong, Another Cleared*, supra note 84 (discussing exoneration of death row prisoner Steve Manning, whose conviction was premised on his alleged jailhouse confession to Tommy Dye, a known "con man and chronic liar who fabricated stories even under oath"; although Dye surreptitiously taped six hours of conversations with Manning and was the

attention¹⁵⁰ to be reaped from helping police solve the “big one”; (2) forced or fabricated confessions;¹⁵¹ (3) forensics evidence that can easily

subject of numerous reports by FBI agents investigating Manning on other charges, neither the tapes nor the reports, but only Dye’s trial testimony, mentioned Manning’s supposed confession to murder (which Dye claimed “occurred during two brief gaps in the tapes”)); Mills & Armstrong, *Inside Informant*, supra note 137 (criticizing Illinois capital prosecutors for frequently using “jailhouse informants . . . in cases where the evidence of guilt was flimsy or during sentencing to demonize a defendant with inflammatory accounts of the crime”—as exemplified by their use of informant Tommy Dye to secure Steve Manning’s conviction, although a federal prosecutor previously had described Dye as “a pathological liar . . . not worthy of this court’s trust,” prosecutors knew Dye “lies about almost everything, even his own name,” including repeatedly under oath in state and federal court, and even though Dye had been exposed as a con artist “so many times that the late Chicago Tribune columnist Mike Royko wrote about him in 1989 and 1990” (three years before Manning’s trial), and as also is exemplified by the use of “snitch testimony . . . [to] convict or condemn 4 of the 12 [other] Illinois Death Row inmates who were later exonerated”; documenting means by which jailhouse informants—who have “little to lose by lying on the witness stand” because they are “[r]arely . . . charged with perjury” and who have “something very real to gain: time shaved off their sentence, creature comforts in jail or some other favor”—“fabricate stories” in capital murder cases, using “details . . . from newspapers or another inmate’s legal papers” or sometimes when “prosecutors and police . . . provid[e] them with false stories to tell”); see also, e.g., Gross, *Lost Lives*, supra note 84, at 139 (reporting statistics suggesting “that witness perjury is a far more common cause of error in murders and other capital cases than in lesser crimes”); Kohn, supra note 138, at 3–4 (describing the recantation by a witness against death row inmate Crossley Green; the witness now says he lied when he told the jury that Green confessed to him, because “Man told me if I don’t say what they want me to say, I go right back to the slammer”); supra note 145 (discussing the Coot case); infra note 160 (discussing Ford Heights Four case).

150. See, e.g., *Strickler*, 527 U.S. at 273–75 & n.5 (1999) (finding that the prosecution in a capital case suppressed evidence that its key witness progressively embroidered her story in order to assist the police in solving the crime); *McDowell v. Dixon*, 858 F.2d 945, 947, 949–51 (4th Cir. 1988) (finding that police withheld the fact that before petitioner’s arrest for the offense for which he was convicted and sentenced to die, the chief prosecution witness—who at trial identified petitioner, an African American man, as the assailant—had told police that the assailant was white).

151. Because interrogation leading to confession “is extremely time consuming”— “[i]t is likely to take hours, perhaps days, to break down a suspect who resists”—“extended interrogation is largely reserved for big cases in which confessions are necessary for successful prosecution. Typically, that means homicides, and especially the most heinous homicides . . . [that] the police are most anxious to solve, and yet, because the victim is dead,” have the most trouble solving. Gross, *Lost Lives*, supra note 84, at 140–41. As a result, false confessions “are three to four times more common as a cause of miscarriages of justice for homicide cases than for other crimes.” *Id.* at 141. See, e.g., *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1094–98 (6th Cir. 1990) (en banc) (overturning capital conviction, on habeas, based on confession obtained after police (1) ignored petitioner’s statements that he wanted the interrogation to stop, (2) threatened to arrest petitioner’s girlfriend (against whom they had no evidence), (3) threatened to send petitioner to Ohio, where, police said, he could be held incommunicado and put through “an ordeal [he] may not forget for a long time,” then (4) suppressed the tape-recorded version of the confession and pieced together a written statement giving a far more inculpatory account than the actual confession); *Jurek v. Estelle*, 623 F.2d 929, 940–42 (5th Cir. 1980) (en banc) (overturning a capital conviction, on habeas, based on findings that police obtained two very different confessions from the mentally deficient petitioner during a 40-plus-hour

period of interrogation without counsel; the exculpatory version of the confession, not admitted at trial, appeared to be in the defendant's words; the inculpatory version, used at trial, had prose beyond defendant's ken); *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, 1095 & n.12 (N.D. Ill. 1999) (granting evidentiary hearing to capital sentenced habeas petitioner and denying presumption of correctness to state court's voluntary-confession finding because the state suppression-hearing judge "did not have access to the voluminous [subsequently disclosed] information about the systematic . . . abuse [of suspects by the Area 2 police unit that interrogated Maxwell—the same unit discussed in *Abramsky, Mills & Armstrong*, and 60 Minues II, *infra*], . . . and Maxwell's attorney never had the opportunity to use that information to cross-examine the officers who testified at the suppression hearing . . ."); Robert Perske, *Unequal Justice?* 54–56 (1991) (discussing Earl Washington case that also was the subject of the PBS Frontline program discussed below); Bedau & Radelet, *supra* note 147, at 139–40 (discussing Freddie Pitts and Wilbert Lee, who were released from Florida's death row after many years and pardoned when another man confessed to the multiple murders to which they had been beaten into confessing); Gross, *Lost Lives*, *supra* note 84, at 141–42 (describing confession of Melvin Reynolds, "a twenty-five-year-old man of limited intelligence" who was repeatedly questioned, including under sodium amytal, culminating in a final 14-hour session laced with threats and promises, prompting Reynolds to confess—because "you [the police] want me to"—to a murder another man committed and, four years later, admitted); *Abramsky*, *supra* note 145 (discussing the Area 2 Chicago police unit: "Dozens of other prisoners [including 10 death row inmates] have come forward saying they were tortured into confessing by police officers from . . . Area Two" and presenting "hair-raising—and remarkably consistent [claims] . . . of alligator clips attached to their ears, noses, mouths, penises, and testicles; of electric shocks to the genitals; of being burned atop radiators" and of "mock executions" and "bags put over their heads for minutes at a time, a technique known as the 'Dry Submarino.'"); Frontline, *supra* note 84 (describing the confession of Earl Washington, a retarded man, to virtually every unsolved sexual assault in Culpeper, Virginia; the subsequent dismissal of all charges save one, when it became clear that Washington could not have committed the crimes; the successful capital prosecution of Washington on the one charge that was not dropped—the rape-murder of a 5' 8" white woman—based on Washington's confession to killing (but not raping) a short black woman; Washington was picked up after having been awake all night drinking, was grilled for two additional days, and willingly agreed to take police to the scene of the crime but took them to the wrong place and exhibited no recognition of the actual location until told by the police that the crime had occurred there; asked later why he told police the victim was black, the retarded defendant answered, "I didn't see a picture of her in the newspaper when she got killed or nothing, [so] I just figured she was black"; the later discovery that Washington could not have been the source of the semen and seminal fluid found on various articles of clothing and bedding at the scene of the crime led to Washington's release from death row after 11 years and to his formal exoneration after 18 years, see *Masters, DNA Clears Inmate*, *supra* note 84); Frank Green, *Question of Life or Death: Illinois Exonerations Spark Capital-Punishment Debate*, *Richmond Times-Dispatch*, Apr. 2, 2000, at A1 (discussing the 18-hour interrogation, complete with false police claims that the suspect had failed a lie detector test and a variety of other psychological ploys, that led Gary Gauger (a recovering alcoholic) to falsely admit killing his parents during a "blackout"; he was later exonerated when members of a motorcycle gang admitted killing Gauger's parents and later laughing about "writ[ing] a book about how to do the perfect murder and not get caught"—by having the police get "the son [to] admit[] to it"); Brook A. Masters, *Lucky Release from a Life Behind Bars*, *Wash. Post*, Apr. 28, 2000, at A23 (discussing confession defendant David Vasquez gave in a Virginia capital murder case after "detectives yelled, cajoled and lied to" the developmentally disabled suspect, "saying they had found his fingerprints inside [the victim's] house"; DNA later proved another man committed the offense); *Mills & Armstrong, Tortured Path*, *supra*

verge on either "junk science"¹⁵² or just plain perjury¹⁵³—especially in

note 137 (conducting independent investigation of the 14 capital convictions the Area 2 police unit in question secured (i.e., five percent of all post-*Furman* death sentences in Illinois, see Armstrong & Mills, *Justice Derailed*, supra note 84), and finding evidence of coercion—often accompanied by other misconduct, including witness intimidation and suppressed evidence—in five of the 14 cases in addition to the five the courts already had overturned; noting that confessions forced by other Illinois officers accounted for two of the 12 (now 14) exonerations of innocent death row inmates in Illinois over the last decade); Sweet, supra note 84 (discussing fabricated or coerced confession of Hubert Gerald); 60 Minutes II, *Torture in Area 2* (CBS television broadcast, Dec. 7, 1999) (transcript on file with the *Columbia Law Review*) (describing systematic pattern of electroshock and suffocation torture of suspects to produce confessions by officers in Area 2 Chicago police unit between the early 1980s and 1993; unit was supervised by Jon Burge who was repeatedly promoted until being fired in 1993 for torturing a suspect into confessing to a crime that put him on death row; the torture ring was broken up only after someone inside the unit used police stationery anonymously to tip off a defense attorney); Jim Yardley, *Texas Inmate's Confession Slips Through the Cracks: Letter to Bush in 1998 Didn't Elicit Action*, N.Y. Times, Oct. 17, 2000, at A20 (discussing Christopher Ochoa's confession to a rape and murder he did not commit in return for a deal permitting him to avoid the death penalty for those crimes; also describing the confession years later, following a religious conversion, of another man who DNA showed did commit the crimes but who in the meantime was left at liberty to, and did, commit other serious crimes); see also Scheck et al., supra note 84, at 78–106, 263 & app.2, (demonstrating that false confessions contributed to 24% of the miscarriages in capital and other cases that were corrected by DNA evidence during the 1990s); Richard Jerome, *Suspect Confessions*, N.Y. Times, Aug. 13, 1995 (Magazine), at 28 (giving various additional examples of apparently forced or manufactured confessions). See generally Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 *passim* (1998) (study of 60 cases in which police-induced confessions were later shown to be actually or probably false; half proceeded to trial or to a pretrial plea bargain (typically accepted in order to avoid the death penalty); 36% resulted in conviction).

152. See generally Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 Va. J. of Soc. Pol'y & L. 439 (1997); Paul C. Giannelli, "Junk Science": *The Criminal Cases*, 84 J. Crim. L. & Criminology 105 (1993) (both articles cataloguing chronic malfeasance and misfeasance in the handling of scientific evidence by police and state experts in serious felony cases).

153. Berlow states:

In Texas, the nation's execution capital, where more than seventy-nine people have been executed in the past three years, prosecutors relied for years on the expert testimony of Ralph Erdmann, a forensic pathologist, who repeatedly falsified autopsy reports to support prosecution arguments in death-penalty cases. A special prosecutor's investigation of Erdmann concluded, "If the prosecution theory was that death was caused by a Martian death ray, then that was what Dr. Erdmann reported."

Berlow, *Wrong Man*, supra note 84, at 77–78. See *State v. Munson*, 886 P.2d 999, 1001 n.5 (Okla. Crim. App. 1994) (noting that Texas eventually took away Erdmann's medical license, and that he pled guilty to seven felonies in connection with corrupt autopsies); see also *Exonerated by Science*, supra note 145, at 15 (noting that in a majority of cases in which DNA evidence ultimately exonerated a prisoner, the prosecution had relied upon less conclusive forensic evidence that "narrowed the field of possibilities to include [the defendant]," then relied upon expert testimony to suggest the "reliability and scientific strength" of the nonetheless inconclusive evidence).

In another Texas case, a man was convicted of capital murder in 1986, based in part

regard to inherently suspect hair comparisons,¹⁵⁴ carpet sweepings, tire

on the testimony of a state expert that forensic evidence at the scene of the rape-murder matched the defendant, even though, of the 28 forensic clues found at the scene, only one was determined to be consistent with any trait that could be associated with the defendant. See *Frontline*, *supra* note 84. The other 27 items of evidence went unmentioned at trial, and the one “matching” trait—O blood type—also “matches” 40% of the population. When DNA testing later revealed that the O-type blood was *not* the defendant’s, the Texas Court of Criminal Appeals declined to order a retrial on the ground that a DNA test could not provide “compelling” evidence of innocence. See *id.*

154. See, e.g., *Williamson v. Reynolds*, 904 F. Supp. 1529, 1557–58 (E.D. Okla. 1995), *aff’d*, 110 F.3d 1508 (10th Cir. 1997) (overturning capital conviction based on, *inter alia*, (1) faulty hair analysis that was so “scientifically unreliable” that it should not have been permitted as evidence of guilt and (2) claims that hairs found at the crime scene “match[ed]” the defendant’s, although hair analysis can never support that categorical a claim); *Nelson v. Zant*, 405 S.E.2d 250, 252 (Ga. 1991) (granting state post-conviction relief from a capital conviction because the state suppressed FBI analyses establishing that the limb hair the state’s expert had used to connect defendant to the crime lacked sufficient characteristics for microscopic analysis; Nelson was thereupon released from prison and not retried because, as the district attorney admitted, there was no valid evidence implicating him in the offense, see *Jingle Davis & Mark Curriden, Man Condemned for Murder of Girl Is Freed*, *Atlanta Const.*, Nov. 7, 1991, at E6); *Scheck et al.*, *supra* note 84, at 158–71, 262 & app.2 (discussing contribution of “Defective or Fraudulent Scien[tific]” analysis of forensic evidence, mainly, bogus microscopic hair comparisons, to 34% of miscarriages revealed by DNA analysis during the 1990s); *Armstrong & Possley, Reversal of Fortune*, *supra* note 137 (discussing contribution to false capital convictions and sentences of four innocent men in Illinois of “bad science, concealment of evidence and misleading rhetoric”: the state hair expert claimed that three scalp hairs found in a defendant’s car were “similar” to the scalp hair of one or the other victim, and that “similar” meant that only one of every 4500 people have scalp hair with the relevant characteristics, after which prosecutors argued that hairs “matched”—and, eventually, that the hairs *were*—the victim’s hairs; in fact, as a different police examiner later revealed, the hairs were *not* similar (one of them was not a scalp hair at all, hence was not amenable to forensic analysis), and the 1/4500 figure required a match between 23 separate characteristics of the hairs being compared—“an exhaustive comparison that [the first expert] had not performed”); *Becka & Swindle*, *supra* note 84 (reporting on DNA tests showing that hairs used at trial to link death row inmate Michael Blair to the killing were not his; also reporting that the state suppressed evidence that the state forensic witness who drew the links—based on which, the prosecutor argued, “You can call it a link, you can call it association, you can call it a match” and that “[t]he evidence is . . . absolutely overwhelming”—was involuntarily committed to a mental hospital by his state crime lab supervisors shortly before Blair’s trial because “they considered him a danger to himself and possibly others” due to “depression and alcoholism”; the witness “was released from the lockdown unit at [a Dallas hospital] twice to testify in capital murder trials”); *Mills & Armstrong, By a Hair*, *supra* note 137 (describing study of all Illinois post-*Furman* capital convictions revealing that at least 20 were premised on hair-comparison evidence, notwithstanding its “notorious[] untrustworth[iness]” because human hair lacks unique qualities, and consequently (1) generates forensic analyses that (a) necessarily depend on subjective comparisons that often lead “experts” to disagree with each other about the same hair comparisons and (b) are entirely unreliable absent intensive analysis of a larger range of factors than many state forensics laboratories actually consider; (2) at most permits the conclusion that the evidentiary hair “could have” come from the suspect’s head—but also from that of many other individuals—though the evidence often is inaccurately characterized by prosecutors in closing argument as “matching” the suspect’s hair or even as *being* the suspect’s hair; and providing a compendium of examples of false convictions based on hair “matches,”

tracks, shoe prints,¹⁵⁵ and predictions of future dangerousness,¹⁵⁶ but also in regard to more reliable fingerprint,¹⁵⁷ ballistics,¹⁵⁸ and

including *Williamson*, 904 F. Supp. at 1529, in which subsequent DNA testing ruled out Williamson and his codefendant as the perpetrators of the rape-murder and also as the donors of the hair found at the scene).

155. Armstrong & Possley describe an Illinois capital murder case in which the misuse of shoe-print experts and other foul play contributed to the conviction of two innocent capital defendants. The lead prosecutor directed one shoe-print expert to "keep his mouth shut about his conclusion" that the shoe print of the man who kicked down the victim's door did not match either defendant's shoes. Only after two additional experts said they could not link the print to a defendant was the prosecutor able to find a fourth expert who was willing to do so. That "expert," who claimed the ability to identify a person's race from his shoe print, was later exposed as a fraud. Another prosecutor failed to reveal that a different state footprint expert had determined that the shoe prints relied on to prove that the male defendants had cased the victims' home ahead of time actually belonged to a woman much smaller in size than the defendants. See Possley & Armstrong, *Prosecution on Trial*, supra note 137; see also *id.* (discussing the contribution to the same false convictions of other law enforcement misconduct, including two police officers' concoction of a statement by one defendant reporting having a "vision" of the offense; another police officer's admittedly false testimony as to when the other two officers informed him of the alleged confession; prosecutors' presentation of the two officers' testimony, even though there was no written record of the "vision" statement and it was never mentioned in testimony to the grand jury that indicted the defendant; and two prosecutors' suppression of a confession to the crime by another man who was serving time for a nearly identical offense and was subsequently linked to the crime by DNA evidence); supra note 138 (describing presentation of faulty expert testimony about fiber, tire-track, and hair evidence in process of convicting Cecil Sutherland of offense he did not commit).

156. Alan Berlow reports:

[To prove "future dangerousness" as a crucial step in imposing the death penalty under the Texas capital-sentencing statute,] Texas prosecutors . . . repeatedly relied on James Grigson, a psychiatrist who became known as "Dr. Death" because his expert opinion [that the defendant would be dangerous in the future] in 124 capital cases contributed to 115 death sentences. One of those sentenced was Randall Dale Adams, whose wrongful conviction was the subject of the movie *The Thin Blue Line*. Grigson testified at Adams's 1977 trial that the defendant had a "sociopathic personality disorder" and that "there is no question in my mind that Adams is guilty." Asked if Adams was likely to kill in the future, given the opportunity, Grigson replied, "He will kill again." In fact Adams was innocent, and had never killed anyone. He came within seventy-two hours of execution.

Berlow, *Wrong Man*, supra note 84, at 78. See Mills et al., *Flawed Trials*, supra note 137. See also *Saldano v. Texas*, 120 S. Ct. 2214 (2000) (*per curiam*) (vacating death sentence that had been premised on an expert witness's conclusion that the defendant posed a danger to the community in the future in part because of his Latino ethnicity); Kathy Walt, *Debate Over Death Penalty Is Renewed; Predicting Future Threat Raises Question of Flaws*, *Hous. Chron.*, July 9, 2000, at 1 (reporting Texas Attorney General John Cornyn's acknowledgement that at least seven people had been placed on the state's death row based in part on expert testimony relying on the prisoners' race or ethnicity as a reason to conclude that they posed a danger of violent behavior in the future).

157. See Moore, supra note 84 (discussing conviction and capital sentence of Kerry Max Cook that was based in large part on the forensically impossible conclusion that the defendant's fingerprint found at scene of crime was less than 12 hours old).

158. See supra note 144 (discussing the *Workman* case).

DNA¹⁵⁹ evidence; and (4) blatant police and prosecutorial misconduct.¹⁶⁰

159. See, e.g., W.C. Thompson, Subjective Interpretation, Laboratory Error and the Value of DNA Evidence: Three Case Studies, 96 *Genetica* 153 (1995) (pointing to uncertainty in interpretation of test results and laboratory errors as "factors that profoundly affect the value of" DNA and other scientific evidence in criminal cases); Weinstein, Many Resist DNA Testing, *supra* note 118 (discussed *supra* note 118).

160. See, e.g., *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000) (overturning murder convictions because in "the State's zeal to obtain multiple murder convictions," it violated the Due Process Clause by (1) relying at Smith's trial on one of two versions of the events, provided by a participant in the burglary-murder, which implicated Smith in the killing; (2) impeaching that witness's contrary testimony that another man and not Smith was to blame; then (3) relying at a subsequent trial on the same witness's "diametrically opposed" version of the events to blame the killing on that other man); *Bowen v. Maynard*, 799 F.2d 593, 599-602, 610-13 (10th Cir. 1986) (overturning murder convictions because Oklahoma prosecutors suppressed a sheaf of investigative reports that a suspect other than the capitally sentenced petitioner had murdered the victim); *State v. Munson*, 886 P.2d 999, 1003 (Okla. Crim. App. 1994) (overturning capital conviction because the prosecution deliberately withheld 165 photographs and up to 500 pages of reports, most of it exculpatory; on retrial, Munson was acquitted, see Randall Coyne, Abe Munson's Near-Death Experience, *Okla. Observer*, Apr. 25, 1995, at 9); Joe Jackson & William Burke, *Dead Run: The Untold Story of Dennis Stockton and America's Only Mass Escape from Death Row* 240-46 (1999) (concluding that Dennis Stockton, whom Virginia executed in 1995, was probably innocent of the crime for which he was executed and was framed by police and prosecutors who singled him out based on his long criminal record, then suppressed evidence showing he was innocent); Scheck et al., *supra* note 84, at 107-25, 172-82 (detailing repeated and systematic misrepresentation and suppression of exonerative evidence by police, prosecutors, and state forensic experts in capital and other cases; "[f]or 63 percent of the DNA exonerations analyzed by the Innocence Project study, misconduct by police or prosecutors played an important role in the convictions," including suppression of evidence of innocence, knowing use of false testimony, witness coercion and other evidence fabrication, and false statements to the jury); *Armstrong & Mills, Conviction Overturned*, *supra* note 138 (reporting unanimous decision of Illinois Supreme Court overturning conviction and death sentence of defendant, notwithstanding "overwhelming" evidence that he killed a police officer in a shoot-out in front of a police station, because Cook County prosecutors engaged in "infantile" behavior, made a "'transparent' play to emotion rather than the evidence" by hauling into court a "headless mannequin wearing the victim's police uniform, which had blood and brain matter on it" and by "improperly present[ing] evidence and arguments that focused on the loss suffered by [the victim's] family and the police force, rather than restricting their case to the evidence against" the defendant); *Armstrong & Mills, Justice Derailed*, *supra* note 84 (over "10 percent of Illinois' death-penalty cases have been reversed for a new trial or sentencing hearing because prosecutors took some unfair advantage that undermined a trial's integrity"; among other things, prosecutors in Illinois "repeatedly exaggerated the criminal backgrounds of defendants[,] . . . lied to jurors, [] . . . browbeat[] jurors, saying they must return the death sentence, or they will have violated their oaths or lied to God[,] . . . misstat[ed] the law or evidence . . . , br[oke] a promise to a defendant not to seek the death penalty [and] . . . allowed their star witness to tell what they knew to be a lie"); *Armstrong & Possley, Reversal of Fortune*, *supra* note 137 (describing events leading to the false convictions of the Ford Heights Four, two of whom spent 17 years on Illinois's death row before being released in 1995: "court rulings, sworn affidavits and interviews with key participants indicate that prosecutors concealed that [their three key] witnesses had received a host of undisclosed benefits for testifying . . . rang[ing] from get-out-of-jail-free cards for Jackson and Gray to a new job [as a security guard] for McCraney": "in exchange

for [Jackson's] testimony a burglary charge against him was dropped," but prosecutors let him testify that "he'd been promised nothing"; prosecutors charged Gray, a retarded woman, with murder when she recanted her claim that she accompanied the defendants during the rape-murder, then agreed to (and did) set her free if she would implicate the defendants (which she did) but let her testify that no deal existed); *id.* (detailing chronic prosecutorial misconduct by Cook county prosecutor Scott Arthur in capital and other homicide cases; discussed *infra* note 229); Armstrong & Possley, *Verdict Dishonor*, *supra* note 84 (reporting findings of *Chicago Tribune's* study of 381 homicide convictions overturned between 1963 and 1998 as a result of prosecutorial concealment of evidence of innocence and presentation of false evidence of guilt; 67 of the 381 cases studied resulted in death sentences and many others were tried capitally; of 67 capital judgments overturned based on prosecutorial concealment of the truth, 30 eventuated in the inmates' exoneration and release from death row after anywhere from 5 to 26 years; concluding that "although prosecutors often downplay individual cases involving such deceit as aberrations, the body of cases turned up by the Tribune's search reveals that it happens frequently and in nearly limitless ways":

With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases. They have prosecuted black men, hiding evidence the real killers were white[,] . . . a wife, hiding evidence that her husband committed suicide[,] . . . parents, hiding evidence their daughter was killed by wild dogs[, and numerous others detailed in the article, hiding evidence strongly implicating different suspects, revealing that state witnesses were lying and were even pressured by police to lie, and that defense witnesses the state discredited were in fact telling the truth].);

Berlow, *Wrong Man*, *supra* note 84, at 70, 74 (discussing discovery of James Richardson's innocence (he spent 21 years on Florida's death row), following a theft from the prosecutor's office of the file in Richardson's case, which showed that the local sheriff and other witnesses had lied under oath to secure Richardson's conviction ("[n]o law-enforcement official was ever held accountable" for lying); proof of Anthony Porter's innocence (he spent 16 years on Illinois's death row and was nearly executed) after journalism students discovered evidence that police ignored suspects identified by a relative of a victim and pressured witnesses and other suspects to implicate Porter, and after the students secured a taped confession by another man; and release of Walter McMillian (he spent six years on Alabama's death row) following proof that "prosecutors withheld [the fact that] . . . the state's principal witness avoided a capital murder charge by testifying against McMillian; . . . other witnesses were paid thousands of dollars for false testimony; and . . . the state's three primary witnesses all later recanted," leading "Alabama eventually [to] admit[] it had made a terrible mistake"); Spencer Hunt, *Clouded Cases: Prosecutors' Conduct Risks Reversals*, *Cincinnati Enquirer*, Sept. 10, 2000, at A1 (reporting, based on study of court records, that "the Ohio Supreme Court repeatedly has criticized Hamilton County [Cincinnati] prosecutors for making improper courtroom statements to win 14 death penalty cases over the past 12 years," mainly statements "that play on jurors' sense of outrage and emotions, that stray from facts in evidence or that paint defense lawyers as dishonest"); Mills & Armstrong, *Tortured Path*, *supra* note 137 ("Charges of police misconduct—from manufacturing evidence to concealing information that could help clear suspects—are central to at least half of the [then] 12 Illinois cases where a man sentenced to death was exonerated."); Moore, *supra* note 84 (discussing police framing of Kerry Max Cook, discussed *supra* notes 145, 157); Rosenberg, *supra* note 114, at 22–24 (discussing "man who spent four years on death row only to be found to have been framed by the Philadelphia police"; crediting the Philadelphia district attorney's policy of "toughness" and heavy use of the death penalty with encouraging the high incidence of "prosecutorial misconduct" in Philadelphia, particularly by the chief of the city's homicide unit, Barbara Christie, whom courts repeatedly criticized for "hiding evidence that indicated a defendant's innocence, and . . . knocking blacks off juries");

Where there *are* eyewitnesses, they can be led by suggestive photo arrays and line-ups to misidentify known suspects—a risk in all cases but especially in ones where contradicting eyewitnesses are scarce and the impulse to solve a heinous crime is great.¹⁶¹ Whatever the prosecution's theory and evidence, the highly publicized nature of capital cases assists police and prosecutors in selling their theory to potential jurors even before the defendant has been formally charged and the trial begins.¹⁶²

supra notes 138, 142–145, 148–151, 153–155; see also Berlow, *Wrong Man*, supra note 84, at 68 (“The reasons [innocent individuals are sentenced to die] range from simple police and prosecutorial error to the most outrageous misconduct, such as the framing of innocent people, and everything in between: perjured testimony, erroneous eyewitness testimony, false confessions (including the confessions of innocent defendants), racial bias, incompetent defense counsel, and overzealous police officers and prosecutors . . .”); *Exonerated by Science*, supra note 145, at 15 (reporting that 29% of rape and rape-murder cases in which the jury convicted a suspect later shown by DNA tests to be innocent involved claims of perjured prosecutorial testimony, fabricated scientific evidence or testimony, or state suppression of exculpatory evidence); *Frontline*, supra note 84 (providing examples of police and prosecutorial manicuring, embellishment, and selective use of witness statements at trial); Matt Lait & Scott Glover, *LAPD Chief Calls for Mass Dismissal of Tainted Cases*, *L.A. Times*, Jan. 27, 2000, at A1 (discussing “Ramparts” scandal in Los Angeles Police Department tainting scores of convictions based on evidence that police officers frequently framed defendants); Bill Moushey, *Government Misconduct in the Name of Expedient Justice*, *Pitt. Post-Gazette*, Nov. 22–Dec. 13, 1998 (ten-part series documenting misconduct by prosecutors and law enforcement personnel resulting in prosecution and conviction of innocent suspects); Katherine Shaver & Steven Gray, *Lawyers Seek Names of Officers Who Lied: Montgomery Verdicts May Be in Doubt*, *Wash. Post*, Oct. 20, 1999, at B1 (discussing eight officers in Montgomery County, Maryland, who repeatedly lied in court over a five-year period, affecting numerous cases).

161. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 273–75 (1999) (finding that state suppressed exculpatory evidence that key witness against the capital petitioner had “muddled memories,” had not accurately identified him as the perpetrator before trial, and was shown a picture of the victim just before testifying, to jog her memory); *Kyles v. Whitley*, 514 U.S. 419, 441–45 (1995) (overturning conviction based on prosecutorial suppression of evidence revealing, in part, that eyewitnesses who confidently identified petitioner at trial as the attacker had originally described a different perpetrator); see also National Institute of Justice, U.S. Dep’t of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 9, 17 (1999) (noting that routine procedures using mug books may be suggestive to witnesses and that results of mug book viewings should be “evaluated with caution”). See generally Gross, *Lost Lives*, supra note 84, at 136–37 nn.53–55 (discussing role of misidentification in miscarriages of justice in criminal cases).

162. See Gross, *Lost Lives*, supra note 84, at 147 (giving examples). The showing needed to establish that prejudicial pretrial publicity warrants reversal of a conviction or capital sentence is notoriously difficult for a defendant to satisfy, thus permitting a substantial amount of pretrial publicity about the case, including the state’s theory and evidence, to reach the jury without any chance that it will lead to the reversal of any conviction or capital sentence that results. See, e.g., *Mu’Min v. Virginia*, 500 U.S. 415, 417 (1991) (permitting trial court in capital case to refuse to question jurors about the content of news reports to which they were exposed in heavily publicized trial); *Tuggle v. Thompson*, 57 F.3d 1356, 1365–66 (4th Cir. 1995) (reversing district court’s grant of habeas relief due to “pretrial influences of the jury resulting from media publicity, media contact with members of the jury, the reading by some members of the jury of articles concerning the case and a false story stating that Tuggle had committed another rape” because “Tuggle did not show as required under the test established in *Murphy v. Florida*

c. *The Capital Charge*. — Merely seeking the death penalty pays prosecutorial dividends.¹⁶³ It enables the state to “death qualify” the jury, thereby (via the trial judge’s exclusion for cause of strongly death-scrupled jurors and the prosecutor’s peremptory challenges of even mildly scrupled jurors) jettisoning the segment of the jury pool that is most likely to be skeptical of informer, police, and forensic testimony and to take seriously the beyond a reasonable doubt standard, and, by repeatedly forcing jurors during the pretrial voir dire to contemplate the imposition of death, making them substantially more likely to vote for death when the time comes.¹⁶⁴ It provides the best plea-bargaining leverage imaginable—leverage sufficient, indeed, to induce even *innocent* defendants to confess or plead guilty to murder to avoid the death penalty, though innocent defendants almost never confess or plead guilty to other serious offenses.¹⁶⁵ It doubles the defense burden with hardly any in-

that ‘the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice’”) (citations omitted) (quoting *Murphy v. Florida*, 421 U.S. 794, 803 (1975)).

163. See, e.g., *Rosenberg*, supra note 114, at 42 (quoting various former and current Pennsylvania prosecutors explaining the Philadelphia district attorney’s practice of seeking the death penalty in nearly all murder cases as self-consciously designed to give prosecutors “a permanent thumb on the scale” enabling them to “use everything you can” to win, including (1) that “[y]ou can hold the defendant without bail,” an advantage only available in capital cases; (2) “it gives you leverage in negotiating guilty pleas”; (3) a capital charge “can . . . keep a good lawyer from taking a poorly paid job representing an indigent defendant” “[g]iven the extra work it takes to defend a client in a death case”; (4) “[p]rosecutors in [Pennsylvania] death cases get 20 peremptory challenges . . . instead of the 7 in a noncapital case”; and (5) “[e]veryone who’s ever prosecuted a murder case wants a death-qualified jury,” because of the “perception . . . that minorities tend to say much more often that they are opposed to the death penalty,” so that “[a] lot of Latinos and blacks will be [stricken from capital juries as a result of] these [death qualification] questions”).

164. See, e.g., *Grigsby v. Mabry*, 569 F. Supp. 1273, 1288–1305 (E.D. Ark. 1983), *aff’d*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev’d sub nom. Lockhart v. McCree*, 476 U.S. 162 (1986) (discussing studies of death-qualified juries showing that the process and outcome of death qualification makes juries more likely to convict and condemn); *Hovey v. Superior Court*, 616 P.2d 1301, 1314–56 (Cal. 1980) (same); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, 8 L. & Hum. Behav. 53, 55–75 (1984) (reviewing relevant studies, virtually all of which conclude that death qualification produces juries more likely to convict than non-death-qualified juries); Gross, *Lost Lives*, supra note 84, at 147 (discussing effects of death qualification on jurors’ propensity to convict capital defendants); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & Hum. Behav. 121, 122–32 (1984) (presenting results of experimental study showing that repeated discussion of death penalty during voir dire increases likelihood that jurors will conclude after hearing the evidence that a death sentence is warranted).

165. See, e.g., Gross, *Lost Lives*, supra note 84, at 142–43 (citing statistical evidence and giving example of John Sosnovske who was implicated in capital murder by his former girlfriend’s false statements, pled no contest to avoid the death penalty, and served five years before another man confessed and pled guilty to the murder); supra note 151 (describing false confessions given, inter alia, to avoid death penalty).

crease in the state's burden.¹⁶⁶ And it encourages defense lawyers to adopt minimalist, risk-averse strategies at the guilt phase (a staple at conferences run by death-penalty lawyers) in order to maximize the lawyer's and her client's credibility at the all-important sentencing phase.¹⁶⁷

These inducements to bring capital charges increase the incentives already discussed to use questionable, even bad faith investigative techniques to justify and support the charges. Although charging the case capitally increases the chance of winning, it also increases the embarrassment and publicity of losing,¹⁶⁸ making it all the more important for police and prosecutors to search for additional ways to win.

d. *The Trial*. — Other corners may also be cut at trial, if need be, to secure a capital conviction or sentence. The defendant may be denied an

166. Anti-death penalty lawyers have made a variety of unsuccessful challenges to the double counting of elements of the offense as aggravating circumstances sufficient to warrant a death sentence and to statutes that make the same facts sufficient to serve as an element and one or more aggravating circumstances. See, e.g., *Jones v. United States*, 119 S. Ct. 2090, 2117–18 (1999) (Ginsburg, J., dissenting) (criticizing majority's decision because it permits double counting of same personal characteristics of victim as basis for two separate aggravating factors); *Lockhart v. Fretwell*, 506 U.S. 364, 367 (1993) (rejecting ineffective assistance claim based on counsel's failure to object in state court to double counting of accompanying robbery as two separate aggravating factors: that the killing was committed for pecuniary gain and that it occurred in the course of another felony); *Lowenfield v. Phelps*, 484 U.S. 231, 241–46 (1988) (upholding use of aggravating circumstance that defendant knowingly created a risk of death or great bodily harm to more than one person both as basis for elevating first-degree murder to capital murder at the guilt phase and then as statutorily necessary aggravating circumstance predicate to a death sentence at the penalty phase); *Perry v. Lockhart*, 871 F.2d 1384, 1392–93 (8th Cir. 1989) (overruling *Collins v. Lockhart*, 754 F.2d 258, 264 (8th Cir. 1985), which had rejected use of same robbery as basis for two separate aggravating circumstances—that murder was committed for pecuniary gain and that it was committed in the course of a felony). Although framed as double jeopardy, Eighth Amendment, and other constitutional challenges, the real difficulty with these procedures is that they enable the state to rest on its guilt-phase laurels at the capital sentencing phase while the defense is required to put on an entirely new and separate case.

167. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 328–34 (1983) (giving what is considered to be the classic description of the preferred, risk-averse strategy at the guilt phase of capital cases); Gross, *Lost Lives*, supra note 84, at 148 (“Fear of a death sentence may drive the defense to make tactical choices that compromise its position on guilt in order to improve the odds on penalty.”). Compare Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 245, 250 (1990–1991) (urging defense counsel in capital cases to use a “‘dramatic psychohistory’ of the client” to maximize the potential for mitigation at the penalty phase, and noting the risk that a single-minded focus on the traditional task of convincing the jury that the defendant is innocent can have the effect of demoralizing counsel upon the jury’s conviction of the defendant of capital murder, which in turn can lead counsel effectively to “throw in the towel” at the penalty phase), with Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1539, 1565–66 (1998) (examining capital jurors’ reactions to various defenses in capital cases and revealing that jurors are not much moved by “abused childhood” or similar, psychologically focused defenses).

168. See supra note 139 and accompanying text.

opportunity to retain experienced counsel of his choice (after his original lawyer dies suddenly the night before trial), and he may instead be forced to go to trial with an avowedly ill-prepared appointed lawyer only six months at the bar.¹⁶⁹ Women with children at home may all be excused from jury service for cause. Blacks also may all be excluded for cause, or at least peremptorily, due, e.g., to their greater tendency to have scruples against the death penalty. The trial judge may seat a prospective juror who swears by the state's theory of the case on the central issue at trial after that theory was reported as fact in press accounts fed to the press by the police. The prosecution may keep the jury from hearing evidence disproving its theory while presenting evidence supporting its theory that (suppressed) police reports suggest was "planted." The courtroom may be loaded with law enforcement officials while the defendant is shackled in front of the jury (after a verbal outburst following the judge's denial of his motion to retain new counsel). Police officers may be questioned about the defendant's post-arrest silence, and prosecutors in closing argument may comment on his failure to testify and on the jurors' obligation to convict and capitally sentence in order to save society from criminals. An attribute of all murders (that they are "heinous, atrocious, or cruel") may be treated as enough to "aggravate" the killing from first-degree murder to a capital offense. After threat of cross-examination that would reveal the defendant's prior record keeps him off the stand at the guilt phase of the trial, the prosecutor at the sentencing phase may use a police officer's hearsay report of the defendant's cross-examination on his prior record at a pretrial suppression hearing to tell the jury about the defendant's record and also about some offenses that have never even resulted in charges, much less convictions. Then, instructions may be given to the jury to presume intent or malice;¹⁷⁰ lengthy aggravating circumstance instructions may be juxtaposed to fleeting references to the role of mitigation; and instructions and argument that state law would keep the thirty-eight-year-old defendant in prison for a minimum of thirty years even if he were not sentenced to die may be barred.

Equally important, the pressure-cooker atmosphere surrounding capital cases very often assures both that they *will* go to trial, and that they will be tried capitally. Thus, if the case seems to be aggravated (as it usually does, given the accompanying felony) and otherwise fits the profile described above (male, outsider, low-status defendant with a prior record, stranger (nondomestic) killing of a high-status victim), virtually no atten-

169. The examples listed in this section are of course only a small subset of the methods available to achieve capital convictions and sentences in weak or inappropriate cases. I chose these, rather than other illustrations, because they all appear to have occurred in a single Tennessee capital case I am litigating in habeas corpus proceedings there. See *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995); Memorandum in Support of Amended Motion for Summary Judgment and Immediate Relief on Seven Claims, in *id.* (filed Dec. 16, 1993).

170. Reversal on this ground mooted many of the other claims. See *Houston*, 50 F.3d at 381.

tion is paid at the investigation and charging stage to defenses or extenuating circumstances or any nuances affecting the degree of the homicide or the desert of the death penalty. The tendency instead is to resist settlement, go to trial—even if the evidence is weak—and demand the highest penalty.¹⁷¹

e. *The Gamut*. — For love of the death penalty—or for their constituents' love of it—some prosecutors notoriously use tactics running the gamut described above. Early in 1999, *Chicago Tribune* investigative reporter Ken Armstrong (evidently, with his libel lawyers' blessing) gave the following description of the capital tactics of Robert Macy, Oklahoma City District Attorney, frequent death penalty user,¹⁷² and former head of the National Association of District Attorneys:

[Macy] has lied. He has bullied. Even when a man's life is at stake, Macy has spurned the rules of a fair trial, concealing evidence, misrepresenting evidence, or launching into abusive, improper arguments that had nothing to do with the evidence, according to appellate rulings condemning his tactics.

In the court of law, Macy meets with constant and sometimes severe criticism. But in the court of public opinion he consistently wins re-election—usually with more than 70 percent of the vote.¹⁷³

171. Professor Gross states:

Prosecutors lose a much higher proportion of murder trials than other felony trials, about thirty percent compared to about fifteen percent, which suggests that in murder cases they are willing to go to trial with comparatively weak evidence. . . . In some cases, . . . the evidence is weak because the defendants are not guilty, and some of those innocent defendants are not only tried but convicted. In other words, (as with police investigations) as prosecutors work to obtain convictions in hard homicide cases, they [are much more likely than in less important situations to] draw in cases where it is difficult to separate the innocent from the guilty.

Gross, *Lost Lives*, supra note 84, at 144; see Rosenberg, supra note 114, at 34, 42 (describing Philadelphia district attorney's practice of charging nearly all homicides as capital murder, then accepting pleas only to sentences of life without parole, which in practice means that plea offers are "seldom accepted"); see also Gross, *Lost Lives*, supra note 84, at 144 ("[A]n actual decision to dismiss a serious charge that would probably have resulted in a conviction is always difficult. It is bound to be much more difficult—and less likely—if the crime has attracted a lot of attention, or if a victim, or several, were killed."). Because many prosecutors simply refuse to plea bargain in capital cases, an important source of information about defenses or the weakness of their cases is unavailable. Moreover, defense lawyers' anticipated inclination to exaggerate to save a client's life makes prosecutors especially likely to distrust information supplied by capital defense lawyers, even highly respected ones. See *id.* at 145; see also Mary Stolberg, *The Jury's Still Out*, *Winston-Salem J.*, June 20, 2000, at A1 (discussing impetus to pursue death sentences, in what even prosecutors believe are marginal cases, under a North Carolina law forbidding prosecutors in potentially capital cases to accept a plea to first-degree murder in exchange for a sentence of life without parole and requiring them either to pursue a death sentence or accept a plea to second-degree murder, which carries only a 13-year minimum sentence).

172. See supra note 140.

173. Armstrong, *Cowboy Bob*, supra note 114. At least four convicted murderers have

3. *Absolute Power: Five Missing Constraints.* — The fact that there are strong political, professional, and emotional incentives to cut corners, and that it is possible—even comparatively easy—to do so in capital cases, is only half the story. The other half is the weakness of the incentives *not* to do so. One might assume that every police officer's and prosecutor's impulse to obtain numerous death sentences is countered by equal and opposite impulses to take care to reach correct results, given that, after all, a life is at stake. But that is exactly what does *not* happen. Consider the five strongest external¹⁷⁴ constraints on prosecutorial overreaching—(1) being exposed or out-manuevered and thus defeated at trial by competent, conscientious, and adequately compensated defense counsel; (2)

received new trials “based upon an appellate finding that Macy broke the rules.” Macy and his trial partners have been criticized by courts for similar misconduct in “at least 17 other” cases, although the errors were found harmless or the convictions were reversed on other grounds. See *id.* Macy's first capital sentence put Clifford Henry Bowen on death row in 1981. Five years later, federal habeas judges overturned Bowen's death sentence, finding that the prosecution suppressed evidence indicating that Bowen was 300 miles away at the time of the killing and that another man (a former police officer) had committed the offense. Bowen was released as innocent. See *id.*; supra note 160 (describing Tenth Circuit's decision in *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986)). Armstrong described another aspect of Macy's record 18 years later, in 1999:

In March, a federal judge ordered a new sentencing hearing for Death Row inmate Kenneth Paxton, saying Macy engaged in “blatant misrepresentation” while convincing the jury to sentence Paxton to death.

In June, the Oklahoma appeals court upheld the conviction of Death Row inmate Osbaldo Torres but upbraided Macy for a host of “improper tactics” he employed while arguing to the jury. The court noted that it had condemned Macy for the same tactics before.

In November, Macy was re-elected to his fifth full term. He ran unopposed. Armstrong, Cowboy Bob, supra note 114. In late 1999, the Tenth Circuit upheld the district court's grant of habeas relief in the Paxton case, concluding that “Mr. Macy clearly and deliberately made two critical misrepresentations to the jury” and that his comments were “an integral part of the deprivation of Mr. Paxton's constitutional rights to present mitigating evidence, to rebut evidence and argument used against him, and to confront and cross-examine the state's witnesses.” *Paxton v. Ward*, 199 F.3d 1197, 1213, 1218 (10th Cir. 1999). Macy told a reporter he “didn't . . . [do] anything wrong.” Court Says D.A. Acted Improperly, *The Daily Oklahoman*, Dec. 30, 1999, at 1A.

Another frequent user of the death penalty is New Orleans District Attorney Harry Connick, Sr., who has been continuously re-elected since 1974 even though his subordinates “have been condemned repeatedly for withholding evidence.” Armstrong & Possley, *Verdict Dishonor*, supra note 84. Connick has been described in print by a New Orleans trial judge as believing that “bad guys are bad guys and whatever we need to do to put them away is OK.” A defense lawyer, who used to work for Connick and who refers to his prosecutors as “lying, cheating bastards,” “has won new trials for five clients—four convicted of murder, one of rape—by showing that [Connick's] prosecutors suppressed evidence.” *Id.* Connick himself admits that his lawyers “find it difficult to keep track of what evidence has been disclosed in . . . case[s] they handle,” but excuses the problem as the product of overwork. *Id.*

174. Internal, i.e., moral or ethical, constraints against making mistakes are probably higher in capital than noncapital cases, but each increment in them is probably matched by the greater emotional payback from solving a serious crime, protecting the community, and subjecting a miscreant to a deserved punishment.

revelation of facts impugning the state's witnesses, exhibits, or theories and supporting those of the defendant; (3) trial court superintendence of the requisites of reliable procedure; (4) jury skepticism and insistence upon an airtight case of guilt and death-worthiness; and (5) anticipation of the embarrassment or other costs of reversal on appeal or post-conviction review based upon a finding of nonfeasance or malfeasance.

a. *Ineffective Defense Lawyers.* — The ABA, Ken Armstrong and colleagues, Vivian Berger, Alan Berlow, Stephen Bright, and others have documented the abysmally ineffectual lawyers—chronically under-remunerated;¹⁷⁵ often young and inexperienced, patently unqualified and in-

175. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1853–55 (1994) [hereinafter Bright, *Worst Lawyer*] (comparing wages of state appointed attorneys in capital cases to their vastly greater earning potential when working on other types of litigation); Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 Geo. J. on Fighting Poverty 1, 14, 16, 18 (1996) (describing state techniques for appointing lawyers in capital cases, ranging from patronage selections off a general list of all local attorneys, regardless of capital, or even criminal, experience; contract systems under which all cases over a particular period go to the lowest bidder (with the flat fee bid covering experts and other expenses), including complex capital cases that unexpectedly appear on the county's docket; reimbursement schemes that limit capital lawyers to, e.g., \$2500 for the entire representation "plus \$50 for each motion . . . filed up to five motions—with the result that the number of motions filed in almost every case is exactly five—or \$1000, including expenses for expert and investigative assistance; or what amounted to "\$15 to \$20 per hour" and "\$11.84 per hour" to represent two innocent men who were sentenced to die in Georgia and Texas but were eventually released for lack of evidence of guilt); Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 Ala. L. Rev. 1, 4–5 (1992) (criticizing Alabama's built-in monetary disincentive—maximum compensation of twenty dollars per hour for any work done out of court and forty dollars per hour for in-court activity, with a \$1000 reimbursement cap—against thorough representation at the trial level); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 Iowa L. Rev. 433, 491–93 (1993) ("The paltry compensation provided to lawyers who are appointed to defend capital cases . . . discourages members of the private bar from developing an expertise in death penalty litigation. . . ."); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. Crim. L. & Criminology 673, 677–82 (1989) (citing burdensome workloads—caused by under-funding and consequent understaffing—as the "single greatest obstacle to effective representation"); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 Rutgers L. Rev. 281, 310–14 (1991) (citing, inter alia, a 1988 Mississippi capital case in which the hourly fee of the defense attorneys worked out to be \$2.98 as a result of the state's statutory limit on reimbursable hours); Albert L. Vreeland, II, *Note, The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 Mich. L. Rev. 626, 642 (1991) ("[P]er case maximums present an immediate threat' to the indigent accused's Six Amendment right to counsel. . . ."); Mary Flood, *What Price Justice?*, Hous. Chron., July 1, 2000, at 1 (noting that, even after Houston, Texas, recently increased pay for appointed capital attorneys, the "roughly \$25,000 [available] for the 1st chair" is insufficient to attract skilled attorneys, who receive at least five times that for the same work from clients who can pay); Rosenberg, *supra* note 114, at 22, 50 (comparing (1) capital representation by appointed lawyers who handle close to 80% of Philadelphia capital cases for a flat fee of \$1700 plus

competent,¹⁷⁶ unethical,¹⁷⁷ or bar-disciplined;¹⁷⁸ sometimes drug-im-

\$400 for each day in court and \$300 for an investigator, with an average cost to the county in 1995 of \$3519 per capital case, to (2) representation by the local public defender office in the one in five cases the office is permitted to handle, which assures two attorneys, a mitigation specialist, an investigator, and access to a staff psychiatrist and fund of expert witnesses, with the result that *no* defendants represented by defenders received the death penalty in 1993–1995, compared to 33 defendants represented by appointed counsel who did so, and to (3) the rare representation by a retained lawyer for whom the going rate in Philadelphia is \$50,000 per case); Swofford, *supra* note 85 (comparing North Carolina's \$85 per hour cap on compensation for defense attorneys appointed to represent indigent capital defendants, to the going rate of \$200 or more per hour for such representation by experienced retained criminal defense lawyers in the state); *infra* note 185.

For case- and state-specific examples, see, e.g., Editorial, No Money for Justice: State Will Help Prosecute Death-Penalty Cases but Falls Short in Ensuring a Fair Defense, *Phila. Inquirer*, Mar. 8, 2000, at A22 (reporting on the Pennsylvania legislature's refusal to provide money for defense of capital cases despite appropriating state funds to assist local prosecutors in such cases); Editorial, Rush to Death, *St. Petersburg Times*, Feb. 10, 2000, at 16A (discussing a Florida case in which a "young, inexperienced lawyer who knew little about presenting a capital defense" and had his fee capped at \$2500 for pretrial and trial proceedings, "was paid the equivalent of \$13 an hour" for what little he did, and failed to present any witness describing his client's "long history of mental illness" because (as the lawyer later testified in court) "he could not afford to call witnesses"); Dirk Johnson, Shoddy Defense by Lawyers Puts Innocents on Death Row, *N.Y. Times*, Feb. 5, 2000, at A1 (citing statements by Chicago's former chief prosecutor and current mayor, Richard M. Daley, that "lawyers in some [capital] cases were incompetent, and even when they were competent did not have the money to conduct their own thorough investigations and compete against the police and [better financed and highly experienced capital] prosecutors"); Sara Rimer, Questions of Death Row Justice for Poor People in Alabama, *N.Y. Times*, Mar. 1, 2000, at A1 (explaining that low maximum hourly rates for work performed by appointed capital trial counsel and trial courts' exercise of discretion to deny compensation for hours admittedly worked result in (1) Alabama trial lawyers "often" limiting themselves to 50 hours or less on capital cases, even though "adequate preparation . . . should take 500 to 1,000 hours" and (2) the under-compensation of lawyers who put in the necessary hours at a rate of about \$5 an hour, prompting one lawyer in the latter category to vow that "I will go to jail before I handle another capital case"). For evidence that poor compensation for capital attorneys translates into high capital sentencing rates, and that generous compensation has the opposite effect, see *infra* note 191.

176. See, e.g., Rick Casey, Texas High Court 'Cynical,' Judge Says, *San Antonio Express-News*, Mar. 8, 2000, at 3A (quoting an unpublished federal district court order granting Texas death row inmate Ricky Kerr a stay of execution based on his representation in state court by an appointed "attorney . . . so unqualified that . . . his appointment . . . [amounted to] 'a cynical and reprehensible attempt [by the appointing court] to expedite petitioner's execution at the expense of all semblance of fairness and integrity" and "apparent bad faith demonstrated by the state of Texas in appointing a plainly incompetent attorney").

177. See, e.g., Alan Berlow, Lethal Injustice, *The American Prospect*, Mar. 27–Apr. 10, 2000, at 54 [hereinafter Berlow, *Lethal Injustice*] (discussing E. Ray Andrews's representation of Betty Lou Beets (whom Texas executed in 2000); Andrews knew the state's principal argument in favor of a death sentence—that Beets had killed her husband to recover insurance proceeds—was false, because Andrews knew that Beets was unaware of the policy until he told her of it a year after her husband's death, but chose not to so inform the jury because doing so would have required him to stop representing Beets and testify, and thus forfeit the literary and film rights to her story; Andrews later served three

paired, drunken,¹⁷⁹ comatose,¹⁸⁰ psychotic, or senile;¹⁸¹ very often grossly

years in prison for extorting a bribe in another murder case); *infra* notes 183, 190.

178. See, e.g., *Armstrong & Mills, Justice Derailed*, *supra* note 84 ("At least 33 times [i.e., in 12% of the cases], a defendant sentenced to die [in Illinois since 1977] was represented at trial by an attorney who has been disbarred or suspended—sanctions reserved for conduct so incompetent, unethical or even criminal the lawyer's license is taken away."); *Berlow, Wrong Man*, *supra* note 84, at 82 (discussing Kentucky study showing that 25% of state's death row inmates had been represented by attorneys who had since been disbarred or had resigned to avoid disbarment; Louisiana study showing that lawyers of inmates executed in state had bar discipline rate 68% higher than bar members as a whole; and Texas Judicial Council study showing that capital defendants with appointed lawyers were 28% more likely than those with retained counsel to be convicted and, if convicted, were 44% more likely to be sentenced to die); *Liz Chandler, Lawyers, Inadequate Defense Cited in a Third of Death Case Reversals*, *Charlotte Observer*, Sept. 11, 2000, at 1A ("Since 1977, when the Carolinas restored capital punishment, at least 15 death verdicts have been overturned because of poor lawyering at trial. And at least 16 other death row inmates—including three who were executed—were represented by lawyers who have been disbarred or disciplined for unethical or criminal conduct."); *Defense Called Lacking for Death Row Indigents, But System Supporters Say Most Attorneys Effective*, *Dallas Morning News*, Sept. 10, 2000, at 1A [hereinafter *Defense Called Lacking*] (reporting, based on examination of 461 Texas capital cases, "that nearly one in four condemned inmates has been represented at trial or on appeal by court-appointed attorneys who have been disciplined for professional misconduct at some point in their careers," in "about half" of which cases, "the misconduct occurred before the attorney was appointed to handle the capital case"); *Dan Malone & Steve McGonigle, Questions of Competence Arise in Death Row Appeal: Lawyer with History of Problems Defends Handling of Case*, *Dallas Morning News*, Sept. 11, 2000, at 1A (describing capital inmate Richard Lee Wardrup's representation by a lawyer who "has been repeatedly disciplined by the bar during the last 15 years," has a history of alcoholism, and is alleged by employees to have drunk heavily and used cocaine during the days when Wardrup's trial took place); *Mills et al., Flawed Trials*, *supra* note 137 (reporting that 33% of the individuals executed in Texas during George W. Bush's tenure as governor were represented by lawyers who had been or thereafter were disciplined by the bar, including following criminal convictions for extortion, forgery, stealing from clients, contempt, and sexual assault and including at least five lawyers (some with multiple executions under their belt) who were disciplined five times or more).

179. See, e.g., *Liz Chandler, With Lives on Line, Attorney Turned to Drink*; *3 Capital Appeals Allege Shoddy Work*, *Charlotte Observer*, Sept. 11, 2000, at 6A (describing representation of three North Carolina men sentenced to die by alcoholic lawyer who admittedly "drank at least a pint of rum a night while handling the three cases"); *Marcia Coyle et al., Fatal Defense: Trial and Error in the Nation's Death Belt*, *Nat'l L.J.*, June 11, 1990, at 30 (discussing, among other examples, the 1982 Florida capital trial of Jerry White at which the trial judge was so concerned about the sobriety of defense counsel, Emmett Moran, that he required Moran to come into chambers each morning so the state's attorney could smell his breath, and after which Moran's investigator swore he saw Moran shoot up cocaine during trial recesses and use speed, alcohol, morphine, marijuana, and quaaludes after court recessed each day; despite this evidence, a divided Florida Supreme Court upheld White's death sentence); *Malone & McGonigle, supra* note 178 (describing the Wardrup case, discussed *supra* note 178); *infra* notes 181, 185, 196 (citing other examples).

180. See, e.g., *Bright, Sacrifice of Fairness*, *supra* note 84, at 184–85 (collecting various examples of lawyers who slept through significant portions of capital trials); *John Makeig, Asleep on the Job? Slay Trial Boring, Lawyer Says*, *Hous. Chron.*, Aug. 14, 1992, at A35 (reporting that defense attorney John Benn "spent much" of George McFarland's

capital-sentencing trial "in apparent deep sleep," "[h]is mouth falling open and his head loll[ing] back on his shoulders"; Benn acknowledged he was sleeping, commenting that "It's boring"; the trial judge dismissed the problem, commenting that "[t]he Constitution doesn't say the lawyer has to be awake"); Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. Times, July 15, 2000, at A1 (detailed account of how attorney Benn's slumbering defense led to McFarland's death sentence despite weak evidence against him).

181. See, e.g., Bright, *Worst Lawyer*, supra note 175, at 1843 & n.49, 1857-66 (providing numerous examples of incompetent capital defense lawyers); Coyne & Entzeroth, supra note 175, at 1, 14-19, 26-27, 31, 58 n.130 (citing numerous post-conviction cases documenting the assignment of capital cases to (1) lawyers who had no criminal, much less capital, trial experience and were only a few months at the bar or, in one case, was a third-year law student, or who were so old that they could not follow the proceedings; (2) lawyers who got to trial without having read the state's capital sentencing statute, who thought the governing statute was one overturned years before, or whose list of "criminal" cases read in preparation for trial consisted (in its entirety) of *Miranda* and *Dred Scott*; (3) co-counsel who disagreed with each other over the appropriate defense and, so, presented inconsistent defenses, or who each thought the other had agreed to conduct the investigation of the defendant's guilt-innocence or sentencing issues so that neither did so; (4) alcohol- and drug-dependent lawyers, including one who later ran into his death-sentenced client in prison after the lawyer was convicted of drug distribution; (5) lawyers who only recently had been suspended or otherwise disciplined; (6) lawyers who admitted their client's guilt of the capital charges, consented to the removal from the jury of the one juror who was holding out for a life sentence, failed to make objections to the obvious legal errors that later led to the reversal of their codefendant's convictions or sentences (the codefendants did object) but permitted the defendant himself to be executed, and ones who informed the jury that they didn't think much of their clients, including because of the client's race; and (7) most commonly, lawyers who simply failed to interview any witnesses or the client, did not view the scene or the state's evidence before trial, did not seek expert examinations of obviously mentally impaired clients, and conducted no other investigation of either guilt or sentencing issues, in the process forsaking substantial available exculpatory evidence); Armstrong & Possley, *Reversal of Fortune*, supra note 137 (describing events leading to false conviction of Ford Heights Four, two of whom spent 17 years on Illinois's death row before being released in 1995: "The prosecutors capitalized on a weak front posted by defense attorneys who were often ill-prepared or incompetent . . . [T]hree attorneys who represented members of the Ford Heights Four have had their licenses revoked or suspended for other matters . . ."); Berlow, *Wrong Man*, supra note 84, at 80-83 (citing various examples documenting the conclusion that "[t]he single greatest threat to an innocent defendant . . . may be his or her own attorney"); Paul Duggan, *Attorneys' Ineptitude Doesn't Halt Executions*, Wash. Post, May 12, 2000, at A1 (describing "partisan patronage" selection of lawyers for indigents in capital cases in Texas, including lawyers repeatedly appointed despite "documented incompetence" and frequent bouts of sleeping in court and another who was "an active alcoholic" and cocaine user at the time of . . . trial" and could not file the appeal because his law license was suspended due to substance abuse); Johnson, supra note 175 (identifying as a "common thread" in miscarriages of justice in capital cases that "poorly financed, often incompetent defense lawyers [have] failed to uncover and present crucial evidence"; and giving various examples "from around the nation of [death penalty] lawyers who slept through trials, or came to court drunk" or who were assigned to handle capital cases despite "specializing in tax law . . . [and] never [having] tried a criminal case"); Nightline: *Crime and Punishment, Poor Counsel* (ABC television broadcast, Feb. 3, 2000) (transcript on file with the *Columbia Law Review*) (citing various examples of incompetent lawyers appointed to handle capital cases, including one who worked out of a bar, another who had never handled a felony case, others who routinely slept in court, another who

negligent;¹⁸² and nearly always out-gunned¹⁸³—who represent capital defendants in most death penalty states¹⁸⁴ around the country.¹⁸⁵ This

never mentioned to the sentencing jury that his client was severely mentally retarded, and still another appointed after he responded to a sign in the courthouse seeking volunteers; concluding that as a result of incompetent representation, “major chunks of the American system of justice . . . have degraded to a scandalous point” leaving defendants “better off . . . to be rich and guilty, than to be poor and innocent”).

182. See, e.g., *Parker v. Bowersox*, 188 F.3d 923, 929–31 (8th Cir. 1999) (finding defense counsel ineffective for failing to respond to state’s argument in aggravation—that defendant killed his girlfriend to eliminate her as a witness against him in a criminal proceeding—by presenting accessible evidence proving that petitioner knew for certain prior to the murder that the victim could and would not testify against him); *Rickman v. Bell*, 131 F.3d 1150, 1157 (6th Cir. 1997) (overturning capital conviction on habeas because counsel’s “total failure to actively advocate his client’s cause” and “repeated expressions of contempt for his client for his alleged actions” had the effect of “provid[ing] [petitioner] not with a defense counsel, but with a second prosecutor”); *Groseclose v. Bell*, 130 F.3d 1161, 1169–70 (6th Cir. 1997) (overturning capital conviction on habeas because counsel failed to develop defense theory and “to conduct any meaningful adversarial challenge, as shown by his failure to cross-examine more than half of the prosecution’s witnesses, to object to any evidence, to put on any defense witnesses, to make a closing argument, and, at sentencing, to put on any meaningful mitigation evidence”; instead, counsel abdicated client’s case to counsel for codefendant who presented a defense that was antagonistic to Groseclose); *Williamson v. Ward*, 110 F.3d 1508, 1512–21 (10th Cir. 1997) (overturning capital conviction on habeas because appointed counsel, who received no funding for expert or investigative services and was paid the statutory maximum of \$3200, failed to investigate a videotaped statement by another person confessing to the crime and extensive evidence of petitioner’s mental illness and likely incompetence to stand trial; DNA testing subsequently established that the petitioner was innocent, and he was released from prison, see *supra* note 118); *Harris v. Wood*, 64 F.3d 1432, 1435–39 (9th Cir. 1995) (overturning capital conviction on habeas because of counsel’s incompetent failure to interview a majority of the witnesses, advice to the defendant to confess to the prosecutor without receiving any promise of reduced charges in return, and failure to file potentially meritorious suppression motions, to propose or object to improper jury instructions, and to raise and preserve meritorious issues for appeal); 1 Liebman & Hertz, *supra* note 42, § 11.2c, ¶ 13(d) (listing 36 post-*Furman* federal habeas reversals of death sentences by courts of appeals due to egregiously ineffective assistance of counsel that in nearly all cases consisted at least in part of counsel’s failure to conduct any investigation in mitigation of the death penalty); Liebman et al., *A Broken System*, *supra* note 81, at app.C (listing more than 100 post-*Furman* reversals of capital sentences by state post-conviction courts due to ineffective defense lawyering).

183. In the worst case, the defense lawyer is not only over-matched but has essentially gone over to the other side. See, e.g., Paul M. Barrett, *Lawyer’s Fast Work on Death Cases Raises Doubts About System*, *Wall St. J.*, Sept. 7, 1994, at A1 (detailing the career of Joe Frank Cannon, a Houston lawyer who has made a living for years by being appointed to represent capital defendants (10 of whom received death sentences), who “boasts of hurrying through [capital] trials ‘like greased lightning’” to save the county money, and who has a history of making elementary legal mistakes and sleeping through capital trials); see also Flood, *supra* note 175 (discussing system in Harris County, Texas, during 1980s and early 1990s of, as one respected lawyer described it, “appointing [capital defense lawyers] who will just roll over (without a fight)”).

184. See *infra* note 191 and accompanying text.

185. In 1990, the *National Law Journal* reached the following conclusions based on a six-month study of the transcripts of nearly 100 trials in Alabama, Georgia, Florida, Louisiana, Mississippi, and Texas that resulted in capital sentences, follow-up interviews,

analyses of statutory defense resources and bar disciplinary records, and other information:

The trial lawyers who represented death row inmates in the six states have been disbarred, suspended or otherwise disciplined at a rate three to 46 times the discipline rates for [all lawyers in] those states.

More than half the defense counsel questioned in an NLJ survey said they were handling their first capital trials when their clients, now on death row, were convicted.

Wholly unrealistic statutory fee limits on defense representation—such as Mississippi's flat, unwaivable \$1,000 cap, equivalent to a fee of about \$5 per hour for many lawyers [a provision that remained in effect in March 2000, see Rimer, *supra* note 175]—act as disincentives to thorough trial investigation and preparation.

Inadequate or non-existent standards for appointment of counsel can result, for example, in an oil and gas lawyer handling a capital trial as his or her first criminal case.

Statutory standards that do exist for appointment of counsel are routinely ignored Capital trials often are completed in one to two days—in contrast to the two-week to two-month trials in [other] regions [of the country] where sophisticated indigent defense systems operate.

Penalty phases . . . usually . . . last only several hours and in at least one case just 15 minutes.

Little effort—and in at least one-fourth of the cases the NLJ examined, no effort—was expended to present mitigating evidence at the penalty phase.

Judges routinely deny lawyers' requests for expert/investigative fees.

State criminal justice systems are ill-equipped to deal with mentally ill or retarded defendants unable to aid their defense attorneys.

[C]ompounding all of these problems, the U.S. Supreme Court decision that lays out the test for ineffective assistance of counsel is itself ineffective . . . ma[king] it all but impossible for death-sentenced inmates to challenge the performance of their trial lawyers.

Coyle et al., *supra* note 179. For numerous examples and evidence that the *National Law Journal's* findings remain accurate a decade later, including in northern venues, see, e.g., Scheck et al., *supra* note 84, at 183–92 (providing examples of attorney incompetence, and arguing that recent changes in the willingness and ability of courts to fund and police competent representation have aggravated the problem); Bright, Worst Lawyers, *supra* note 175, at 1841–66 (arguing that inadequate legal representation is pervasive in those jurisdictions that account for most death sentences); Armstrong & Mills, Inept Defenses, *supra* note 137 (reporting that state and federal courts have overturned 26 of 285 Illinois death sentences imposed between 1977 and 1999 due to prejudicial attorney incompetence (many of the 285 remain under review on this basis); four of the 12 men exonerated in the state between 1987 and November, 1999, were represented by lawyers who have had their licenses suspended or withdrawn; lawyers “handpicked by the courts in Illinois capital cases have included a tax lawyer who had never before tried a case, an attorney just two years out of law school and an attorney just 10 days off a suspension for incompetence and dishonesty”; the assigned lawyer two years out of law school handled the case himself, though he had never before tried a murder case, was carrying 100 other appointed criminal cases, had no investigator, and was denied funds for a sentencing expert (by contrast, “the local prosecutor received help trying the case from a lawyer in the Illinois attorney general’s office, a common [practice]”); Illinois trial judges appointed Robert McDonnell to represent four people now on death row in between McDonnell’s two disbarments (an Illinois record) and despite McDonnell’s record of emotional instability, drinking, and criminal problems); Berlow, Wrong Man, *supra* note 84, at 82–83 (documenting the failure of state and local jurisdictions to provide adequate legal representation in capital cases); Flood, *supra* note 175 (describing indigent capital defense

counsel situation is worse in capital than in noncapital cases in two important respects. First, capital trials are much harder to litigate well than noncapital trials. Built into them are a hugely complicated body of specialized law, a second, sentencing trial that almost always is more far-ranging, expert-dependent, and factually complex than the guilt phase, and a host of peculiar tactical and strategic decisions caused by the need to “unify” one’s defense strategy at two individually daunting and jointly contradictory proceedings (the defendant didn’t commit capital murder; even though the defendant committed capital murder, it wasn’t (or he isn’t) so bad that he deserves a death sentence).¹⁸⁶ Second, although most criminal defense lawyers are overworked and (even more so than in noncapital cases) underpaid, what they do for a living in the main is settle cases for lower sentences than would be imposed after a trial.¹⁸⁷ To use Vivian Berger’s metaphor, what they do most of the time is hardly brain surgery. But capital cases settle much less frequently,¹⁸⁸ and when they do, the bargaining is far harder and more sophisticated than in other kinds of cases¹⁸⁹—hence the many depredations (in Professor Berger’s full phrase) of “the chiropractor as brain surgeon.” Indeed, because a case in which a death sentence was imposed is virtually certain to have gone to trial—not many lawyers are reckless enough to advise clients to plead guilty to capital murder without an agreement or understanding that doing so will avoid the death penalty¹⁹⁰—it is highly likely that *any* capitally sentenced defendant who finds himself in that fix got there after a settlement-specializing chiropractor attempted to open up that capital defendant’s cranium at trial.¹⁹¹

system in Harris County (Houston), Texas, from the 1970s until the mid-1990s as characterized by “cronyism” and patronage appointments of unqualified, poorly remunerated, and frequently bar-disciplined lawyers, some of whom handled dozens of capital trials each and typically failed to keep their clients off death row); *supra* notes 175, 178, 181–183.

186. See, e.g., Berger, *supra* note 167, at 247–51; Coleman, *supra* note 52, at 16–19, 52–53; Luke DeGrande, *Representing the Condemned: Professional Responsibility and Death Row*, 78 Ill. B.J. 30, 33 (1990).

187. See Gross, *Lost Lives*, *supra* note 84, at 142–45.

188. See *supra* notes 90, 171.

189. See Gross, *Lost Lives*, *supra* note 84, at 144–45.

190. Such pleas do occasionally occur, however. See, e.g., *Mitchell v. Kemp*, 483 U.S. 1026, 1026–32 (1987) (Marshall, J., dissenting from denial of certiorari) (describing as ineffective assistance of counsel capital attorney’s encouraging and allowing client to plead guilty to capital murder without securing a deal to avoid the death penalty, followed by counsel’s failure to present any evidence whatsoever to the sentencing judge in mitigation of death penalty, and the trial judge’s imposition of death). I represented the petitioner in *Mitchell* during part of his federal habeas proceedings. One of the first depositions I ever took was of his trial lawyer, by then a trial judge in the community where Billy Mitchell was tried. At a break in the deposition—but not for the record—the judge informed me that he had been a sociology major in college and, based on that, believed that the best outcome for Mitchell was the death penalty. Mitchell was executed in 1987.

191. The Colorado, Connecticut, Indiana, New Jersey, and New York experiences suggest that properly funded and expert trial lawyers provide a meaningful constraint on

prosecutors' capacity to secure, and thus their willingness to seek, marginal capital sentences. Of these approaches, the best documented is Indiana's. See Lefstein, *supra* note 114, at 496–504, 505–08, 505 tbl.1, 506 tbl.2, 508 tbl.3, 509–12, 521–26, 533 (discussing apparent effect of Indiana's adoption of legislation in the early 1990s making state funds available to local jurisdictions that satisfy state commission's guidelines for appointment of qualified counsel in capital cases, and Commission's incorporation within its guidelines of a state supreme court rule (1) requiring the appointment of two lawyers in capital cases with recent extensive training in capital defense and with, respectively, at least five and three years criminal litigation experience that includes at least five and three felony jury trials; (2) disqualifying lawyers with excessive workloads; (3) setting minimum hourly rates that are relatively generous, though they remain well below the rates prevailing among retained attorneys; and (4) assuring "adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase"). According to Lefstein, prosecutorial requests for death sentences dropped from an average of 23 per year in the two years before, to 12 per year in the three years after, Indiana's adoption of its reforms, jury-imposed death sentences dropped from five to zero in the same period, and judge-imposed death sentences experienced a smaller decline, from 1.5 per year to one per year—even though the state's murder rate steadily increased during the period. See *id.* Lefstein also reports agreement among state capital prosecutors and defense counsel (whom he interviewed before his statistical data were available) that the reforms had (1) improved the quality of capital defense lawyering in the state, especially by increasing the use of expert witnesses at the mitigation phase; (2) attracted more and better defense lawyers to the work; (3) probably generated better police and prosecutorial preparation and decreased the likelihood that the resulting (smaller number of) capital judgments would be reversed on appeal; and in the words of prosecutors (4) "definitely put a damper on [their] asking for the death penalty," "put some economic judgment" into the decision-making about whether to seek the death penalty" and made prosecutors "think two or three times" before filing a death penalty request," not only because of the greater cost of trying cases but also because of the increased "risk [of] losing." *Id.* (citations omitted). Based in part on a comparison of the Indiana experience to that of Ohio, which adopted similar reforms but compensated defense lawyers at only two-thirds of the rate in Indiana, provided funds for expert witnesses and mitigation specialists far less frequently than in Indiana, and experienced smaller declines in the death-sentencing rate, Lefstein concluded that there is "strong[]" reason to believe that the "ability of defense counsel, the cost of the prosecution, and the burden on the prosecutor's staff" (both of the latter of which in turn are affected by the quality and resources of defense counsel) affect prosecutorial charging decisions in capital cases. *Id.* See also Richard Pérez-Peña, *The Death Penalty: When There's No Room for Error*, N.Y. Times, Feb. 13, 2000, at WK3 (contrasting high capital sentencing states like Alabama, Georgia, and Texas, where there is "a culture of habitually appointing courthouse hangers-on" who "don't know capital law, [a]re cozy with the judges and [a]re underpaid," with three states that finance expert statewide capital defense units—Colorado, which although "a Western state where the death penalty is popular," has had only five death sentences imposed in only 52 capital trials since 1975, and which in recent years has had only about three capital prosecutions a year, "in part, experts say, because [prosecutors] believe that the Colorado Office of the Public Defender will defeat all but the strongest cases"; Connecticut, which also has a capital defense team of experienced state public defenders and has had few prosecutions and no executions during the last 27 years; and New York, whose "gold standard" Capital Defender Office has 21 highly trained trial lawyers and 17 investigators, with an annual \$15 million budget, has appeared in 524 cases in which a capital charge was a possibility, and has limited to 39 the number of capital charges actually brought and to five the number of death sentences actually imposed); Rimer, *supra* note 175 (contrasting New York, New Jersey, and Colorado, which have "multimillion-dollar capital defender offices that provide

The absence of determined opposition is probably sufficient in itself to encourage some prosecutors to succumb to incentives to secure capital sentences where the facts do not, or only marginally, justify that outcome. The other four constraints on prosecutorial corner-cutting also do little to counteract—the political capital that capital politics tempt prosecutors to amass by overzealously pursuing death sentences.

b. *Suppressed Contrary Evidence.* — Consider, for example, why exculpatory evidence is so often suppressed before and at trial, yet is so often crow-barred out of the state, under the same legal standard, during post-trial proceedings.¹⁹² Part of the answer is the effect in capital cases of the Court's self-defeating standard for the release of exculpatory evidence, which demands its release *before* trial "only if there is a reasonable probability that, [if] the evidence [is] disclosed to the defense, the result of the proceeding would . . . be[] different."¹⁹³ Obviously, this test gives police officers and prosecutors with an eye on the large rewards from securing a capital sentence (and the large penalties for *failing* to do so) immense before-the-fact leeway to conclude that after the fact they will not believe the evidence they suppressed would have mattered. Moreover, in exercising the foresight the Court's test demands, the prosecutor will find it particularly easy to reach a "don't disclose" conclusion because she

teams of lawyers and investigators for people in death penalty trials" and low death sentencing rates, with Alabama, which "has no state-wide public defender system" and relies on "[c]ourt-appointed capital defense lawyers [who] are paid so little that many lawyers refuse the work[,] . . . leaving many of those charged with capital offenses with inadequate representation" by "lawyers who fail to do the most fundamental tasks, like investigating the crime and their clients' backgrounds and presenting closing arguments," and which, in 1999, put "more people [on death row] per capita than any state in the country"); Daniel Wise, *Prosecutors Show Caution Seeking Capital Sentences*, N.Y. L.J., Sept. 13, 1999, at 1 (attributing low number of New York capital prosecutions and sentences—37 and 5, respectively, in four and one-half year period starting in 1994—in part to generously funded and highly trained and qualified Capital Defender Office lawyers). See also, e.g., Bowers, *supra* note 114, at 1075–77 & tbl.2 (concluding, based on interviews with Florida prosecutors, that the quality of the defense lawyer is a factor in deciding whether to accept a noncapital plea in cases charged capitally); Flood, *supra* note 175 (suggesting that the decision by Harris County (Houston), Texas, to require appointed capital defense lawyers to meet minimum qualifications led more attorneys to present mitigation testimony in the punishment phases of trial, possibly helping to account for a drop in prosecutorial capital success rates); Dan Horn, *Cincinnati Enquirer*, *Public Defenders' Pay Near Lowest*, Feb. 3, 2000, at A1 (Hamilton County, Ohio, which includes Cincinnati, sends more people to death row than any other county in Ohio and pays public defenders less to represent them than all but one of Ohio's 88 counties; its hourly "rate of \$30 an hour—57 percent below the state average—is the same whether the case is a minor felony such as theft or a death penalty case"); David Noonan, *Death Row Cost Is a Killer*, N.Y. Daily News, Oct. 17, 1999, at 26 (reporting that the cost of prosecuting and defending capital prisoners in the period during which only five capital sentences were imposed (from 1994 to 1999) was \$68 million, half of which was used to fund counsel for indigent defendants).

192. See, e.g., Armstrong, *Cowboy Bob*, *supra* note 114; Berlow, *Wrong Man*, *supra* note 84, at 66–67, 70, 74; examples discussed *supra* notes 148, 150, 152–155, 157–160.

193. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

naturally will ask whether the suppressed evidence would make a difference in the clumsy hands of the defendant's untutored and underpaid lawyer. The rest of the answer appears once we juxtapose the prosecutor's motivationally blurred foresight with the post-conviction court's twenty-twenty hindsight from corrective lenses fashioned by the well-tutored and highly motivated anti-death penalty lawyer who materializes on post-conviction review. Overproduction of death sentences occurs at trial, that is, because prosecutors are not in fact pushed to disclose, and cannot imagine what it would be like to be pushed to disclose, and thus *do not* disclose, the exculpatory evidence that consequently only emerges later, when newly intervening and better anti-death penalty lawyers do more and better pushing.

c. *Lax Judicial Supervision.* — Nor are *trial judges* disposed to apply the brakes to proceedings that are speeding toward a death sentence with highly motivated and weakly constrained prosecutors at the wheel. The last thing an elected trial judge wants (trial judges in death sentencing states are almost all elected;¹⁹⁴ many of them began their political careers as prosecutors¹⁹⁵) is a district attorney's angry statement on the evening news blaming "the people's" defeat in a capital case on a trial judge's decision to suppress evidence, limit questioning, or withhold a desired instruction.¹⁹⁶ Trial judges are also unlikely to force prosecutors to dis-

194. See Bright & Keenan, *supra* note 115, at 776–80; Liebman et al., *A Broken System*, *supra* note 81, at 127 n.54; *infra* notes 197, 198.

195. For examples, see *supra* note 190 and accompanying text; *infra* notes 196, 231, 232 and accompanying text.

196. See, e.g., Armstrong & Mills, *Conviction Overturned*, *supra* note 138 (reporting that the Illinois Supreme Court, in the process of unanimously overturning the conviction of a police killer despite overwhelming evidence of guilt, "took Cook County Circuit Judge Daniel Kelley to task for failing to halt the prosecutors' [egregious] misconduct and for allowing them to place in the courtroom a headless mannequin wearing the victim's police uniform, which had blood and brain matter on it"); Armstrong & Mills, *Justice Derailed*, *supra* note 84 (discussing one Illinois trial judge (who has sentenced more people to die than any other judge in the state but one) who appointed a previously disbarred lawyer to represent the capital defendant, seated a juror whose husband, a judge, had previously sentenced the capital defendant to prison, and who has had six of his nine capital sentences overturned on appeal (some of the others are still under review), and another judge who "mocked" defense lawyers for seeking DNA tests for their client that, when ordered by the Illinois Supreme Court, demonstrated the defendant's innocence); Armstrong & Possley, *Reversal of Fortune*, *supra* note 137 (documenting symbiosis between "egregious" prosecutorial behavior in court and trial judges who permit trials, in the words of one appellate court, to "[t]ake place in an atmosphere of near anarchy"); Rimer, *supra* note 175 (describing Alabama trial judge who permitted a capital defendant to be sentenced to die at a trial the judge had to interrupt for a day so the court-appointed defense lawyer, whom the judge found in contempt for coming to court drunk, could dry out in jail; the result was several years of post-conviction litigation, ending in a retrial and a life sentence).

The symbiotic relationship between prosecutors and trial judges in capital cases is nicely illustrated in a *New York Times Magazine* profile of Philadelphia district attorney, Lynne Abraham, entitled "Deadliest D.A.," because of her insistence on seeking death in every case in which it might possibly be permitted. Because Philadelphia is one of a

close evidence the latter prefer to withhold, to appoint better defense lawyers, or to replace demonstrably incompetent ones, not only because doing so may trigger prosecutorial or voter complaints about interference, cost, and delay, but also because judges themselves tend to benefit from more, not fewer, death sentences. This is so because judges, and the governors who appoint them, run for office based on the high number of death sentences *juries* impose in trials over which the judges preside, and may be defeated for reelection because trials over which the judges preside result in acquittals or life sentences.¹⁹⁷ These same con-

handful of cities in which all homicide cases are assigned to the same group of specialized judges, "[p]rosecutors have been able to knock lenient judges out of the program and steer the most serious cases to a handful of those most sympathetic to their charges," including one now-retired judge, Albert F. Sabo, who "presided over 31 death sentences, more than any other judge in the country [as of 1995]" and who made it a practice to "suggest[] to prosecutors . . . how to strengthen their cases and routinely denied money to defense attorneys to pay for experts." Abraham herself first came to prominence in Philadelphia as a judge in the specialized homicide unit, leading directly to her election as district attorney Rosenberg, *supra* note 114, at 23-24, 34.

197. Alan Berlow reports:

In Tennessee, . . . Governor Don Sundquist proclaimed before a 1996 judicial election that he would appoint only death-penalty supporters to be criminal-court judges. Some judges and judicial candidates who must run for office have clearly imbibed a similar message, campaigning for office with promises to impose the death sentence at every opportunity. In thirty-two of the thirty-eight death-penalty states judges may be subjected to voter approval. In most it is highly implausible that a candidate who refused to take a strong position in favor of the death penalty could be elected. Judges are also elected in eight out of the nine states where it is a judicial prerogative to impose a death sentence or to override a jury's sentence of life. Can such judges fairly examine the facts in a gruesome murder case when the public is demanding execution?

Berlow, *Wrong Man*, *supra* note 84, at 80; see, e.g., Coyne & Entzeroth, *supra* note 175, at 13 ("The death penalty and politics . . . are inseparable," particularly because "the vast majority of judges who preside over capital cases must answer to the electorate" and because "judges are far less likely to punish misconduct and take other tough action if they must run for reelection or retention every few years'" (quoting ABA, Rep. of the Comm'n on Professionalism, 112 F.R.D. 243, 293 (1986)); Dateline, *Mock Justice?: The Competency of a Texas Public Defender Questioned* (NBC television broadcast, Aug. 30, 2000) (transcript on file with the *Columbia Law Review*) (reporting view of respected former Houston, Texas, criminal trial judge Jay Burnett, who presided over "many death penalty trials," that, because Texas "judges are elected," some of them "to win votes . . . want to move [capital] cases quickly and keep convictions high to show voters they're tough on crime" and for that reason "select attorneys who they know won't put on an aggressive defense"); Maura Dolan, *Execution Issue Clouds Davis' Judge Selections*, L.A. Times, Nov. 13, 1999, at A1 (reporting complaints that California Governor Gray Davis, "haunted by the memory of former Chief Justice Rose Bird . . . whom voters ousted because she never voted to uphold a death sentence," is demanding, in the opinion of Peter Keane, Dean of Golden Gate University Law School, that his appointees to the state's trial and appellate courts profess support for the death penalty as "the greatest thing since sliced bread"); David R. Dow, *The Real Scandal on Death Row Is Inept Lawyers*, Hous. Chron., Feb. 24, 2000, at A29 (stating that because "judges in [most] states, including Texas, are elected" and "will be voted out of office if the capital murder defendants over whose trials they preside do not get sentenced to death," they have "a powerful interest in seeing to it that defendants are convicted quickly and packed off to death row"); Bart Jansen, Davis:

Judicial Picks Should Follow My Lead, *Orange County Register*, Mar. 1, 2000, at A4 (reporting Governor Davis's statements to reporters "that voters elected him based on public positions in favor of capital punishment and abortion rights . . . [and] expect his [judicial] appointments to follow his political views": "My appointees . . . are not there to be independent agents. They are there to reflect the sentiments that I expressed during the campaign."); see also *Harris v. Alabama*, 513 U.S. 504, 519–20 & n.5 (1995) (Stevens, J., dissenting) (expressing concern about "a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty" and about the consequent "danger that [judges] will bend to political pressures when pronouncing sentence in highly publicized capital cases"); Blume & Eisenberg, *supra* note 114, at 470–75 (describing a variety of campaigns to unseat state judges based on their alleged failure to impose or affirm death sentences); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 308–12 (1997) (describing trend whereby judges have increasingly come under political fire, explaining the detrimental effects of irresponsible criticism, and calling for leadership and systems that protect judicial independence); Bright, *Sacrifice of Fairness*, *supra* note 84, at 184 (giving example of justice voted off the Tennessee Supreme Court due principally to a silent concurrence in a single death penalty reversal in an election "that became a referendum on the death penalty"; quoting Tennessee Governor Don Sundquist asking: "Should a judge look over his shoulder [in making decisions in capital cases] about whether they're going to be thrown out of office? I hope so."); Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases*, 31 *Colum. Hum. Rts. L. Rev.* 123 *passim* (1999) (providing additional examples of judges under attack due to the outcomes of capital cases over which they presided).

Bright & Keenan note that:

Judges have come under attack and have been removed from the bench for their decisions in capital cases—with perhaps the most notable examples in states with some of the largest death rows and where the death penalty has been a dominant political issue. Recent challenges to state court judges in both direct and retention elections have made it clear that unpopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court.

Bright & Keenan, *supra* note 115, at 760–61, 765 (citing numerous examples of judges removed from office as a result of their record in capital cases, and of their successor judges' pronounced proclivity to impose and affirm death sentences); see also Jo Becker, *Justices Leery of Appeal Changes*, *St. Petersburg Times*, Mar. 15, 2000, at B5 (describing Florida legislators' attacks on the Florida Supreme Court for staying a law designed to increase the number and speed of executions while the court considers the law's constitutionality, and their proposal to expand the size of the court to enable pro-death penalty Governor Jeb Bush to pack the court with death penalty supporters); Martin Dyckman, *Courts at Mercy of Legislative Purse*, *St. Petersburg Times*, Mar. 23, 2000, at A17 (quoting letter written to all state supreme court justices by the chair of the state legislative committee that controls the courts' budget, on stationery indicating his position as appropriations chairman, calling the justices' death penalty "decisions . . . a mockery to the victims and their families"); William Glaberson, *Chief Justices to Meet on Abuses in Judicial Races*, *N.Y. Times*, Sept. 8, 2000, at A14 (describing "an unusual 'summit meeting'" at which state chief justices will meet to discuss ways "to limit what some of them describe as increasing abuses in bitter election contests for judgeships," including candidates' statements "indicat[ing] how they would decide on issues like the death penalty or abortion"); see also Symposium, *supra* note 139, at 270–73 (presenting statements by judges participating in symposium describing criticism they faced during elections based on their decisions in capital cases); *supra* notes 139–140 and

siderations explain why trial judges in states that authorize them to do so (1) impose death sentences so frequently (more often than juries¹⁹⁸) and (2) replace life sentences juries impose with death sentences so much more often than the reverse.¹⁹⁹

d. *Credulous Jurors*. — This is not to say that juries impose much of a check on overly motivated and insufficiently constrained law enforcement officials. To begin with, the heinous nature of the offense in most capital cases is likely to weaken the “beyond a reasonable doubt” conviction that jurors are supposed to have before finding the defendant guilty and the crime capitally aggravated. In the usual Holmesian formulation, the beyond a reasonable doubt test is supposed to make jurors feel ten times more regret if they convict an innocent defendant than if they acquit a guilty one.²⁰⁰ Holding jurors to that skewed regret matrix is difficult under any circumstances and is particularly problematic when jurors consider the price of a mistaken acquittal to be the release of a brutal and dangerous killer.²⁰¹

Once jurors find the defendant guilty of aggravated murder, moreover, they then are strongly disposed to condemn the defendant by three

accompanying text (describing political pressures on district attorneys in potentially capital cases). See generally William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 *Am. J. Crim. L.* 77, 135 (1994) (detailing results of survey of legislators showing substantial support for proposition that “a vote against the death penalty would ‘definitely hurt your re-election chances’”).

198. See *Harris*, 513 U.S. at 521 (Stevens, J., dissenting) (“Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty.”); see also, e.g., Editorial, *Flawed System*, *Las Vegas Rev.-J.*, July 10, 2000, at B6 (criticizing Nevada system using three-judge panels to decide between life and death sentences in cases in which juries cannot reach agreement, while permitting judges to opt out of service on such panels: “In a state where voters directly elect them, judges disinclined to support the death penalty have every incentive to beg off rather than risk creating a campaign issue for a future opponent.”); Bill Hethcock, *The Colorado Gazette*, Mar. 27, 2000, at M1 (“There’s a strong chance that the judges in the Colorado Springs case will vote for death [as they ultimately did] . . . because of the public outrage that erupted last year when [the codefendant] was allowed to live . . . ‘A non-death verdict is a ticket to public outrage in this county,’ [a defense lawyer] said. ‘Any judge who votes for life is going to be unemployed when they come up for retention.’”); Julia C. Martinez, *Vote Retains 3-Judge Panels in Death-Penalty Cases*, *Denv. Post*, Mar. 25, 2000, at A15 (discussing apparent threat by Colorado Senate President to delay action on a bill affecting state judicial authority in capital cases in order “to influence the [capital] sentencing outcome in [a] murder trial in his hometown” as to which it is “no secret that [the Senate President] believes [the defendant] . . . should be sentenced to die”).

199. See *Harris*, 513 U.S. at 521 & n.8 (Stevens, J., dissenting) (noting that “Alabama judges have vetoed only five jury recommendations of death, but they have condemned 47 defendants whom juries would have spared” and citing statistics showing similar patterns in two other “judge[] overr[i]de” states, Florida and Indiana).

200. See Richard O. Lempert et al., *A Modern Approach to Evidence* 234–39 & n.50, 1241–45 (3d ed. 2000).

201. See Gross, *Lost Lives*, *supra* note 84, at 148. Death-qualification also weakens capital juries’ commitment to the beyond a reasonable doubt standard. See *supra* notes 163–164 and accompanying text.

common beliefs, which prosecutorial arguments sometimes encourage and judicial instructions either tolerate or underline:

1. If the jury does not sentence the defendant to die, he will be eligible for parole. This belief was accurate during most of the post-*Furman* period, due to the deliberate under-use of life without parole ("LWOP") options in death-sentencing states by legislators who accurately feared that such options would dampen citizens' ardor for death penalty legislation.²⁰² The "parole belief" has persisted even as LWOP options have become more common.²⁰³ It strongly inclines jurors to impose death

202. See, e.g., William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 *Tex. L. Rev.* 605, 611 n.21, 646 n.198, 708–09 & nn.288, 292 (1999) (noting that a number of death sentencing states (and many more until very recently) lack LWOP alternatives to the death penalty and concluding, based on statements by state legislators, that "[t]he failure of states to make LWOP available for capital murder appears to be due, in part, to legislators' . . . apprehension that having LWOP would mean a reduction in the use of the death penalty"); Bowers et al., *supra* note 197, at 137–42 (finding that legislators often vote against LWOP alternatives to the death penalty, erroneously believing that if they vote the other way their constituents will punish them at the polls); see also Mark S. Hamm, *Legislator Ideology and Capital Punishment: The Special Case for Indiana Juveniles*, 6 *Just. Q.* 219, 229 (1989) (explaining that legislators' fear of appearing "soft on crime" can lead them to "take public stances on getting tough" on capital charged juveniles as well as adults); Lefstein, *supra* note 114, at 512 (noting that, after the state legislature and supreme court adopted rules requiring multiple, better trained and funded defense lawyers in capital cases, Indiana prosecutors "lobbied for the life without parole option . . . in order to get around" the capital case reforms; attributing lower rate of capital prosecutions to combined effect of better-financed defense counsel and existence of LWOP option).

Regarding the large drop in public support for the death penalty when life without parole is offered as an option, see, e.g., ABCNEWS.com, *Split Decision on Death Penalty* (visited Oct. 13, 2000) <<http://abcnews.go.com/sections/politics/DailyNews/poll000119.html>> (on file with the *Columbia Law Review*) (reporting that in an ABC News poll, 64% of Americans say they support the death penalty for people convicted of murder, but that the percentage drops to 48% when LWOP is an option); Greg Lucas, *Poll Takes Snapshot of Californians' Views*, *S.F. Chron.*, Jan. 14, 2000, at A20 (reporting that, in California poll asking respondents to choose between death or LWOP as the appropriate punishment for murder, 49% chose death and 47% chose LWOP); Eric Zorn, *Prosecutors Deaf to Outcry Against Death Penalty*, *Chi. Trib.*, Mar. 7, 2000, at N1 (reporting results of *Chicago Tribune* poll of Illinois voters, showing a 15-point drop in support for the death penalty (from 58% to 43%) when LWOP is given as an option). See generally Bowers et al., *supra* note 197, at 79, 102–07 ("When people are presented with an alternative to the death penalty that incorporates both lengthy imprisonment and restitution to murder victims' families . . . they consistently choose the non-death-penalty alternative.").

203. See Bowers & Steiner, *supra* note 202, at 645–52, 704, 708 & n.289 (1999) (documenting 11-state study of capital-sentencing jurors finding that "very few jurors believe that LWOP is the punishment usually served by those not given death," even in states where LWOP is the mandatory alternative to a death penalty); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 *Cornell L. Rev.* 1, 15 (1993) (statistical study finding that South Carolina jurors vote for death "because of false impressions about parole eligibility"); Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 *L. & Soc'y Rev.* 461, 474–77 & tbl.2 (1999)

rather than life.²⁰⁴

2. If a convicted murderer is eligible for parole, he is likely to get out of prison within seven to twenty years.²⁰⁵ This belief is inaccurate because most or all states now make the alternative to a death sentence a mandatory minimum sentence of well over twenty years.²⁰⁶ Citizen estimates of how long prisoners convicted of murder must serve before becoming eligible for parole consistently fall well below the actual number of years,²⁰⁷ and with few exceptions, trial courts refuse, and defense law-

(reporting finding of a survey of capital jurors in several states that the median juror estimates of years usually served by convicted murderers in the four states in the survey, in which the alternative to a death sentence in fact was life without parole, all fell within the 15–20-year range); see also *Simmons v. South Carolina*, 512 U.S. 154, 159, 170 n.9 (1994) (citing studies). In *Simmons*, the Court for the first time ruled that prosecutors could not simultaneously seek the death penalty based on the defendant's danger to society in the future and yet withhold from the jury the fact that the alternative to a death sentence is life without parole. *Id.* at 171. The Court has interpreted that ruling narrowly, however. See *Ram Dass v. Angelone*, 120 S. Ct. 2113, 2126 (2000) (concluding that state judges may decline to give instruction on LWOP as an alternative to the death penalty if they find that, despite a statute mandating the LWOP alternative, a defendant given that sentence might still become eligible for parole at some point). The Court also has refused to extend the *Simmons* ruling to impose a requirement that capital jurors be informed (which few of them are, see *infra* note 208) of even lengthy minimum sentences that apply in states that do not provide for life without parole. See *Brown v. Texas*, 522 U.S. 940, 940–43 (1998) (Stevens, J., respecting the denial of certiorari).

204. See *Brown*, 522 U.S. at 941 n.2 (Stevens, J., respecting the denial of certiorari) (describing “[p]oll data from various States support[ing] the conclusion that full information [about sentencing alternatives to the death penalty] would have an impact on jurors’ decisionmaking”); Bowers & Steiner, *supra* note 202, at 660, 652–71, 705 (reporting results of statistical study in 11 states showing that “mistaken estimates of early release [of capital defendants] appear to be decisive in the decision-making of jurors who have not made up their minds before deliberations begin or by the time of the jury’s first vote on punishment,” and concluding that “[t]he empirical evidence, especially the accounts jurors give of their own punishment decision-making, reveals that the absence (real or imagined) of [a life without parole] option figured prominently in the decisions of many jurors to impose death”); Eisenberg & Wells, *supra* note 203, at 15 (“Juries that might otherwise sentence to life do not do so because of false impressions about parole eligibility.”); Steiner et al., *supra* note 203, at 493–94 & tbl.4 (reporting results of 10-state survey of capital jurors: “The shorter time jurors think prison confinement would be if they did not impose the death penalty, the more likely they are to vote for death . . .”); cf. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 64–67 (2000) (concluding based on extensive survey of capital jurors that, among emotions that capital jurors report having during capital trials, two—fear of and sympathy for the defendant—appear to influence how a juror votes; fear has the greatest influence on undecided jurors, nudging them towards death).

205. See Bowers & Steiner, *supra* note 202, at 634–35, 637, 645–52, 660–61 (citing various studies and reporting their own data demonstrating that “[j]urors grossly underestimate how long capital murderers not sentenced to death usually stay in prison” and that “people generally believe murderers not given a death sentence will be back on the streets in relatively few years; most said ten or less”).

206. See Julian H. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 Vand. L. Rev. 529, 540 (1990) (as of 1990, at least 30 states had adopted life without parole as an option for the most serious murders).

207. See Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty*

yers are forbidden, to clue jurors in on the minimum number of years that must be served.²⁰⁸ These beliefs, again, lead jurors to vote for death.²⁰⁹

3. If the jury does sentence the defendant to death, the sentence will be reviewed by a myriad of state and federal judges (which is well-publicized, well-known, and accurate, though prosecutors and trial judges cannot directly say so at trial²¹⁰), and by the governor on clemency (which is formally accurate, although clemency rarely is granted,²¹¹ and is something jurors *may be* and sometimes *are* told by prosecutors and trial

Debate, 26 Ann. Rev. Soc. 43, 47 (2000) (concluding that "most citizens and jurors do not realize" the wide availability of LWOP as the mandatory punishment when the death penalty is not imposed and that they "vastly underestimate the amount of time that those convicted of capital murders will spend in prison"); Steiner et al., *supra* note 203, at 472, 475-77 & n.38 (reporting that capital jurors in an 11-state juror survey "consistently believe[d] that murderers not sentenced to death will usually be back on the streets sooner than state law permits"); see also *supra* note 205.

208. See, e.g., Bowers & Steiner, *supra* note 202, at 630-43 (tracing the history of the presumption against informing capital jurors about parole and discussing studies that indicate the importance of such information to capital sentencing jurors). Among states that do not have life without parole, "[o]nly New Mexico, Ohio, and Indiana permit argument by counsel to the jury on the issue of [mandatory minimum terms before eligibility for] parole," and only New Jersey permits jurors who ask to be given accurate answers; California law requires jurors to be told that the state's "life without parole" option may result in parole. Steiner et al., *supra* note 203, at 482 n.46.

209. See *supra* note 204.

210. See *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). But cf. *Romano v. Oklahoma*, 512 U.S. 1, 9-10 (1994) (juror may be told that defendant already is under sentence of death in another case, notwithstanding the danger that the jury will treat the imposition of an apparently supernumerary death sentence as less serious than imposing a first such sentence); Kevin Michael Miller, Note, *Romano v. Oklahoma*: The Requirement of Jury's Sense of Responsibility and Reliability in Capital Sentencing, 44 Cath. U. L. Rev. 1307, 1352 (1995) (arguing that *Romano* unwisely neutralized *Caldwell*'s effort to assure that juries feel a sense of responsibility for imposing the death penalty).

211. See Victoria J. Palacios, Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases, 49 Vand. L. Rev. 311, 347-53 (1996) (noting a decline in death penalty commutations since 1972 and suggesting that it is due to actual or anticipated political penalties for granting clemency); Michael L. Radelet & Barbara A. Zsembik, Executive Clemency in Post-*Furman* Capital Cases, 27 U. Rich. L. Rev. 289, 290-92 (1993) (claiming that, in light of its decline in frequency, clemency "is a filter available more in theory than in actual practice"); Berlow, Wrong Man, *supra* note 84, at 80 ("Since 1973 there have been more than 6,000 death sentences and only forty cases of clemency nationwide."); Randolph Pendelton, Clemency Rarely Given in Florida, Fla. Times Union, June 24, 2000, at A1 (noting that no death row inmate has received clemency in Florida since 1983); Frontline, *supra* note 84 (describing pressure on governors with aspirations to higher office to forgo granting clemency to capital prisoners, even ones whom DNA evidence seems to show are innocent). Clemency may be staging a minor comeback; five governors in five states granted clemency petitions in 1999, the most governors acting in a single year since *Furman*. See Jim Yardley, A Role Model for Executions, N.Y. Times, Jan. 9, 2000, at WK5 (noting that the five death sentences commuted in 1999, including one each in the strongly pro-death penalty states of Texas and Virginia, was a record for the preceding two decades, during which an average of only one commutation had occurred each year).

judges²¹²). Jurors consequently believe that it is not at all certain that anyone they sentence to die will actually be executed, though the blame for a lesser sentence will lie elsewhere.²¹³ This “layers of review/likelihood of reversal” belief is largely accurate, although the nation’s odd penchant for highly public reversals of death sentences, but—contrary to all good deterrent theory—poorly publicized and *nonpublic* executions could lead jurors to underestimate the likelihood of execution.²¹⁴

In other words, when jurors decide whether or not to sentence a defendant to death, they believe (as they report to researchers) that a life verdict makes *them* responsible for putting the miscreant back out on the street within a decade,²¹⁵ while a death sentence displaces the ultimate decision onto *someone else*²¹⁶ who in all likelihood (jurors accurately be-

212. See *California v. Ramos*, 463 U.S. 992, 1001–03 (1983) (upholding constitutionality of California law requiring that capital sentencing jurors be told of the governor’s power to commute death sentences); Blain LeCesne, *Tipping the Scales Toward Death: Instructing Capital Jurors on the Possibility of Executive Clemency*, 65 U. Cin. L. Rev. 1051, 1056–62 (1997) (discussing mandatory instructions in California and Louisiana capital cases regarding governor’s power to commute death sentences).

213. See Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 Buff. L. Rev. 339, 352–54, 362–64 (1996) (discussing post-sentencing interviews with 153 actual capital jurors, revealing that they felt little responsibility for death sentences and less for executions and that, “[o]n the whole, jurors simply do not believe that defendants sentenced to death will in fact ever be executed,” with “[a] clear majority say[ing] that ‘very few’ death-sentenced defendants will ever be executed, and about 70 percent . . . believ[ing] that ‘less than half’ or ‘very few’ will be executed”); see also *supra* note 92 (collecting local press reports informing the public about high reversal rates and low execution rates in many capital sentencing states).

214. See *supra* note 104; *infra* text accompanying note 236.

215. See, for example, New York’s capital sentencing statute, which requires capital sentencing jurors to be told of the state’s sentencing scheme, which permits parole after 25 years if some jurors vote for death and others for life, but imposes life *without* parole if the jury is unanimous for life. N.Y. Crim. Proc. Law §§ 400.27(1), 400.27(10)–(11) (McKinney 2000). The only possible reason for having this cockeyed sentencing scheme—and for insisting that capital jurors be informed of it—is to put pressure on minority jurors holding out for life to switch to death so that the defendant is not made eligible for parole as a result of a nonunanimous verdict.

216. See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 435 (1995) (“The diffusion of moral responsibility that occurs when a decision is perceived (correctly or not) to be divided among a number of participants . . . [undermines the sense of responsibility of] all participants in the decisionmaking process, which in the capital context may include everyone from law enforcement agents to the actual executioner.”). The hypothetical nature of the act of serving up a death sentence at trial may explain jurors’ proclivity to testify under oath or tell reporters on the eve of the same defendant’s actual execution that they would not have imposed a death sentence had they known one or another thing about the defendant or the offense that was kept from them at trial and that they have only recently learned. See, e.g., the Williams, Silagy, Stockton, Brogdon, Adamson, Jones, and Coleman cases cited in 1 Liebman & Hertz, *supra* note 42, § 21.2, at 840–41 n.14 & 1999 Supp. (discussing admissibility of post-trial, out of court statements by jurors in capital and other cases that newly discovered evidence would have led them to reach a different result at trial); Berlow, *Wrong Man*, *supra* note 84, at 68–69 (discussing “[d]oubts about the guilt of capital offenders . . . raised by jurors

lieve) will stop the defendant from being executed. Once again, the imbalance between the (particularly defense) resources available at the front-end and those applied at the back-end has perverse, capably over-productive effects. Prodded by prosecutors and trial judges who stand to reap substantial rewards if their prodding succeeds, undeterred by defense lawyers at trial who have too little gumption and too few resources to put up a fight, and let off the hook by the accomplishments of highly motivated and competent defense lawyers *after* trial, jurors are caught in a self-fulfilling regress: Realizing that intense post-trial scrutiny makes execution an unlikely outcome of a death sentence, they are encouraged to impose death verdicts that fully responsible jurors would realize are not deserved, thus necessitating intense post-trial scrutiny to catch their mistakes.²¹⁷ And so on.

e. *Weak Feedback from Reversals.* — None of this would matter so much, of course, if there were an effective feedback loop from the post-trial (two-thirds reversal) stage to the trial (overproduction) stage. But there isn't. To begin with, the slap on the hand does not come contemporaneously with the violation (as deterrence theory requires for good effect²¹⁸) but on average five to eleven years later.²¹⁹ By then, the indi-

who learned after an execution of evidence they hadn't heard during the trial"); Yates, *supra* note 144 (reporting that, upon hearing of principal witness's recantation and of ballistics evidence withheld by the state at trial, five of six jurors who voted to condemn Philip Workman at his 1982 trial and whom a newspaper reporter was able to find and interview 18 years later "said they now have doubts that Workman killed [the victim] and would like to see a new trial"); see also Berlow, *Wrong Man*, *supra* note 84, at 77 (reporting statement of a juror in the Rolando Cruz case who voted to convict Cruz despite "grave reservations about the defendants' guilt . . . because 'I was more than willing to say, "All right, we'll put you in the slammer for a while, and sooner or later the truth is going to come out.'")").

217. The reverse also may be true: Jurors who believe that death sentences will actually be carried out may impose them less frequently. See Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 *Stud. L., Pol., & Soc'y* 71, 97-98 (1993) (documenting a drop or tapering off of death sentences in Georgia, Florida, and Louisiana immediately after 12- to 24-month periods in which executions surged); Jason DeParle, *Abstract Death Penalty Meets Real Execution*, *N.Y. Times*, June 30, 1991, § 4, at 2 (noting that not long after Louisiana—a state that was "so enthusiastic about capital punishment that a legal newspaper dubbed it 'Death Mill, U.S.A.'"—executed eight men in 11 weeks, juries there "[s]uddenly . . . stopped handing out death sentences," prompting some informed observers to speculate that jurors are less likely to impose death sentences they believe will actually be carried out); see also Laurie Asseo, *Death Row Develops into a Growth Industry*, *The Grand Rapids Press*, Sept. 30, 1999, at A10 (suggesting that drop in death sentences imposed nationally in 1997 was result of spike in executions in preceding years).

218. See James Q. Wilson, *Thinking About Crime* 117-21 (rev. ed. 1983).

219. See Liebman et al., *A Broken System*, *supra* note 81, at 29-30, 40-41, 63 fig.9, 76 (presenting data showing that between 1973 and 1995, direct appeal reversals of capital verdicts—accounting for 80% of the total number of capital-verdict reversals during the period—occurred on average about five years after trial, and that federal habeas reversals—accounting for about 10% of all reversals—occurred on average about nine years after trial, with the latter average rising to 11 years in the second half of the study

vidual responsible for the violation very often is long gone from the agency that, in theory, is held responsible: Local prosecutors, for example, frequently go on to become state judges; trial judges move to higher courts or other offices.²²⁰ Even if the official is still there and is (atypically²²¹) identified publicly, the transgression is likely to appear to the public—to whom patterns of abuse are largely invisible²²²—as an isolated and youthful indiscretion in service of a good cause. The value to local officials of delay in appellate courts' reactions helps explain why prosecutors and trial judges, who work so assiduously at trial to ensure death sentences, are so accommodating thereafter, when the defendant's trial lawyer, the court reporter, or defendant's appellate counsel (whose new-trial motion, transcription, and notice of appeal and briefs are prerequisites for appeal) ask to delay the appeal for months or even years.²²³

When the slap eventually does come, it is not the prosecutor's, but a state bureaucrat's, hand that initially sustains it. In all but one or two states,²²⁴ appeals and post-conviction proceedings are handled by lawyers in the state attorney general's office—attorneys who, in my experience, believe themselves to have less clout and status within the state's law enforcement apparatus than district attorneys, or even assistant district attorneys.²²⁵ As a result, any "loss" sustained on direct appeal or post-con-

period); *supra* note 96 and accompanying text (reporting similar Justice Department estimates of time required for capital appeals); *infra* note 245 (giving examples of lengthy appeals).

220. See examples discussed in *supra* note 190 (discussing capital trial lawyer who by the time he was charged with misconduct in a federal habeas proceeding had been elected as a state judge), note 196 (discussing a state trial judge assigned to county's specialty court for capital cases who thereafter was elected district attorney); *infra* note 228 (noting that by the time prior state prosecutors' misconduct was exposed, one was an elected state judge and another was a federal prosecutor), note 229 (discussing former Cook County State's Attorney Richard M. Daley, who had gone on to be elected mayor of Chicago by the time the courts began identifying serious defects in capital convictions he had obtained as the county's chief prosecutor), note 231 (discussing prosecutor elected to Congress after putting innocent man on death row), note 232 (discussing several prosecutors responsible for abuses in capital cases who later were appointed to prestigious positions in the executive branch or were elected judges).

221. See *infra* note 233 and accompanying text.

222. See *infra* notes 226–236 and accompanying text.

223. Pre-appeal transcription typically takes much longer in capital than in noncapital cases because capital cases involve more complex pretrial motions practice, more often *go to trial*, and take longer *to try* (due, for example, to extra, death-qualifying voir dire and a full-fledged sentencing trial). See *supra* note 110 (reporting that pre-appeal transcription takes on average 12 to 24 months in California capital cases). Capital appeals lawyers are rarely anxious to rush given how poorly paid they are, and capital clients may acquiesce in the delay (to the limited extent they have any say in the matter) because speed can hasten execution as well as release.

224. One exception to this rule, Louisiana, has a much lower reversal rate in the Fifth Circuit than does Mississippi. See Liebman et al., *A Broken System*, *supra* note 81, at 59, 60 tbl.8, 61 fig.8.

225. Judging from my experiences as a capital defense lawyer, the trajectory for ambitious (particularly politically ambitious) young lawyers in the state attorney general's

viction review is not the “loss” of the local prosecuting office that generated the death sentence in the first place. Instead, it is the “loss” of a lower status official in the state attorney general’s office who, even if she isn’t given the blame for the loss, is unlikely to make it an object lesson back in the district attorney’s office.

Most importantly, the slap on the wrist is only that. It is neither money damages (from which the police officer, prosecutor, and, usually, the municipality are almost always immune²²⁶), nor even an enforceable injunction to change the local policies and practices that led to the mistake: The slap is merely an order to “try the defendant again” or to give him a new sentencing hearing. Bar discipline is almost nonexistent;²²⁷

office seems to be to move to a job as an assistant district attorney and then as a supervisor in that office, rather than moving up through the ranks of the state attorney general’s office.

226. See, e.g., *Board of County Comm’rs v. Brown*, 520 U.S. 397, 403 (1997) (“We have consistently refused to hold municipalities liable under a theory of *respondeat superior*.”); *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987) (“Our cases have . . . generally provid[ed] government officials performing discretionary functions with a qualified immunity shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.”); Bennett L. Gershman, *Prosecutorial Misconduct* § 14:13 (2d ed. 1999) (discussing impediments to damages awards against prosecutors for misconduct); Armstrong & Possley, *Break Rules*, *supra* note 137 (concluding, based on intensive analysis of Illinois’s treatment of prosecutors found to have committed prosecutorial misconduct in homicide cases, that “[t]here is little threat of financial penalties from a civil lawsuit because courts have granted prosecutors immunity” subject to only “narrow exceptions”). A partial exception to the absence of remuneration for miscarriages of justice in capital cases (and criminal cases generally) are occasional, usually legislated, awards to individuals released from death row upon conclusive proof (typically supplied by DNA evidence) that they are innocent. See *infra* note 246 (giving examples). Because these rewards are episodic and usually flow directly from the legislature to the individual without any assignment of blame or liability to particular law enforcement officials or offices, they have little deterrent effect.

227. See, e.g., Armstrong & Mills, *Justice Derailed*, *supra* note 84 (documenting state bar committee’s failure to impose discipline on a prosecutor referred to it by the Seventh Circuit based on the state’s attorney’s “shocking” and “reprehensible” suppression of exculpatory evidence); Armstrong & Possley, *Break Rules*, *supra* note 137 (concluding, based on *Chicago Tribune*’s intensive analysis of Illinois’s treatment of prosecutors found to have committed egregious prosecutorial misconduct in homicide cases, that the threat of bar discipline “is hollow. Courts have referred numerous prosecutors to the Illinois agency that polices lawyers only to see investigative files get opened and closed with no punishment levied”); Berlow, *Wrong Man*, *supra* note 84, at 83 (contending that professional standards are “widely ignored and largely unenforceable,” and that Bar Association guidelines are “purely hortatory” and “rarely put into practice” in capital cases).

For defense lawyers found to have performed incompetently in capital trials, the negative consequences are even less frequent and severe. See Ill. St. B. Ass’n, *Advisory Opinions on Professional Conduct*, Op. No. 89-7 (1989) (absolving public defenders of duty to report allegations of ineffective assistance of counsel to bar disciplinary committee); In the Matter of Steven Dean Applegate, Comm’n No. 96 SH 90 (Ill. Atty. Reg. Disp. Comm. June 30, 1997) (withholding bar sanction, despite a state appellate court’s conclusion that the attorney in question had rendered ineffective assistance of counsel,

prosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs;²²⁸ and even more rare are investigations by police or prosecuting agencies themselves to find out why the mistakes that led to reversals and even to the release of innocent condemned prisoners were made.²²⁹ For this reason, the press is often horri-

because the conduct in question did not rise by clear and convincing evidence to the level of a violation of the disciplinary rules); *Armstrong & Mills, Inept Defenses*, supra note 137 (reporting that no lawyer in any of the 26 Illinois capital cases overturned by state and federal courts due to incompetent representation has been disciplined for that incompetence, although one was disciplined for conflict of interest in simultaneously representing the capital defendant and a critical witness against him); see also Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong With Rights We Find There*, 9 *Geo. J. Legal Ethics* I, 6-7 (1995) (finding that "state courts are all but unanimous in holding that a criminal defendant, who challenges his conviction based on ineffective assistance of counsel and whose claim is denied, is collaterally estopped from suing for malpractice," thus "provid[ing] counsel with a powerful incentive to oppose actively the ineffectiveness challenge to the conviction" in state post-conviction and federal habeas proceedings in order to establish a defense to later malpractice suits as well as bar sanctions). The dearth of bar discipline for the bad lawyering that helps send people to death row is ironic, given that as a class, the lawyers appointed to represent capital defendants in most states have much-higher-than-average rates of bar discipline for infractions other than incompetent capital representation. See supra notes 177, 178, 181, 185 and accompanying text.

228. Alan Berlow documented one such instance:

[E]ven if former death-row inmates truly believe they were framed by police officers and prosecutors, such claims are nearly impossible to prove. In the Rolando Cruz case [in which an innocent man was tried and spent 10 years on Illinois's death row *after* another man confessed to the crime], a special prosecutor . . . indicted four policemen and three former prosecutors [one of whom by then was an elected judge and another was a federal prosecutor, see *Armstrong & Possley, Reversal of Fortune*, supra note 137] for falsely accusing Cruz, charging them with perjury and obstruction of justice. But this is believed to be the only death-penalty case in U.S. history that has led to such high-level indictments, and earlier this year all the defendants were acquitted.

Berlow, *Wrong Man*, supra note 84, at 70, 74. In an extensive study, the *Chicago Tribune* identified only two other instances:

A Tribune examination of homicide cases over the past 36 years shows 381 homicide convictions have been reversed because prosecutors knowingly used false evidence or withheld evidence suggesting the defendant's innocence, [but] not a single prosecutor in those cases was ever brought to trial for the misconduct. . . . Only two of those cases even resulted in charges being filed and, in both instances, the indictments were dismissed.

Possley & Armstrong, *Prosecution on Trial*, supra note 137.

229. *Armstrong & Mills* report, for example, that although the current Cook County State's Attorney has abandoned a number of cases against men released from death row "where evidence of their guilt unraveled during appeals," he has exhibited an "apparent lack of enthusiasm for finding out why such faulty prosecutions were mounted in the first place, or whether police and prosecutors acted criminally in securing those convictions." *Armstrong & Mills, Flawed Cases*, supra note 114. Thus, after paying \$36 million to settle lawsuits by four men who were wrongly convicted of murder and who alleged that they were framed by the county sheriff's office, see *Armstrong & Mills, Justice Derailed*, supra note 84, the State's Attorney "successfully opposed the appointment of a special prosecutor to review the conduct of the sheriff's police officers and prosecutors who sent the [four

fied to find (if it ever gets wind of the problem, as occurs only in large

men] to prison, including two to Death Row," and the sheriff has declined to conduct his own investigation because the "state's attorney's office told [him] there was no need to because [his officers] had done nothing wrong." Armstrong & Mills, *Flawed Cases*, supra note 114; see also, e.g., Berlow, *Wrong Man*, supra note 84, at 78 ("[N]o government agency, federal or state, has conducted a comprehensive analysis of why [innocent defendants are convicted and condemned]—not even in Florida, where at least eighteen innocent men have been discovered on death row since 1977."); id. at 74 ("[I]n practice prosecutors rarely find any reason to investigate, let alone indict, their colleagues" for concealing evidence of innocence or presenting evidence they know to be false, and offending officials are never "barred from practicing law."). See generally Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 393 (1992) (although prosecutors "wield vastly more power than ever before," they "are more insulated from judicial control over their conduct" and "are increasingly immune to ethical restraints"); Armstrong & Possley, *Verdict Dishonor*, supra note 84 ("Vested with the power to decide life or death, prosecutors are among the most powerful public officials. They are also the least accountable."). In this regard, consider the views of *Chicago Tribune* columnist Eric Zorn:

What do former Death Row inmates Perry Cobb, Darby Tillis, Verneal Jimerson, Dennis Williams, Anthony Porter and Steven Smith have in common?

At one time, each was being hustled toward the execution chamber at the vigorous urging of deputies of Richard M. Daley's.

Daley, now mayor of Chicago, was the elected state's attorney of Cook County either during the trials or retrials of half of the dozen men in Illinois who have been exonerated and freed from Death Row since capital punishment was reinstated.

. . . 61 percent of capital convictions won by Daley's prosecutors were reversed on appeal.

Ten of Daley's capital convictions were reversed based in whole or in part on findings of prosecutorial misconduct and sent back for new trials or resentencing hearings. Two others were sent back because county prosecutors had been overzealous in seeking the death penalty, and three simply fell apart due to powerful evidence of innocence.

Those 15 do not include other instances of dubious conduct in capital cases under Daley, such as his assistants' handling of the 1986 murder trial of William Franklin. Prosecutors told jurors at that trial that the star witness to the murder was a bystander when in fact he was an accomplice—a misrepresentation that got Franklin's co-defendant, who had been sentenced to 40 years, a new trial. But the Illinois Supreme Court barred Franklin from raising the same issue on procedural grounds, and he remains on Death Row.

. . . .
 . . . When [Daley] decided in November 1986 to do something about the troubling number of reversals from his office, he asked four top supervisors to address the felony division about proper trial conduct and procedure.

But surprisingly (or maybe not so), three of the speakers were representative of the problem, not the solution: Scott Arthur, the assistant state's attorney who put on the bogus, flimsy case that wrongfully convicted the Ford Heights Four and put two of them on Death Row; Tom Gainer, who just prior to addressing the felony prosecutors on propriety had had a conviction overturned in federal court when an appellate judge found he had repeatedly failed to heed the trial judge's order to stop reminding jurors that the defendant had failed to testify; and Jay Magnuson, whose conduct in the Linscott case included "rank" and "calculated" misrepresentations of evidence in the harsh opinion of the appellate court that reversed the case.

Zorn, *Daley's Oversight*, supra note 114.

cities with an aggressive newspaper that has investigative reporters to spare) that (1) repetitive abuses by particular police officers or prosecutors have been generating complaints from defendants, lawyers, and eventually appellate courts, as well as actions for damages, for years;²³⁰ (2) supervising officials and voters have taken no ameliorative action;²³¹

230. Consider, for example, the police torture ring that was allowed to operate in a precinct house in Chicago in the 1970s and 1980s, notwithstanding that the unit generated "[d]ozens" of "remarkably consistent" prisoner and lawyer complaints in criminal motions and civil rights complaints alleging the use of torture to induce confessions and convictions (10 of them capital). Abramsky, *supra* note 145. Jailers early on reported to the police chief that officers in Unit 2 had turned over one suspect, whose injuries were similar to those of others who had been interrogated by Unit 2, "with severe facial bruising and cuts suggestive of a prolonged pistol-whipping, strange alligator-clip marks on his ears, nose, penis, and testicles, marks indicative of wires . . . attached to his extremities"; the police chief wrote then-head prosecutor Richard Daley ("Daley's office never replied") "outlin[ing] the specific charges against [unit chief Jon] Burge and his team, detail[ing] [the police chief's] belief that top officers in the precinct must have known what was going on in their holding cells and call[ing] for a broad outside investigation." *Id.* Appellate courts reversed numerous convictions in cases investigated by the unit based on faulty confession findings; subsequent civil rights suits cost the city more than a million dollars in damages; and the unit was the subject of "a scathing *Amnesty International* report." The only ameliorative action the city ever took—13 years after it first heard complaints—was to fire unit chief Burge. The state has never confessed error in any conviction that it premised on a confession the unit obtained. Rather, 20 years later, it continues to defend the convictions (several of them capital) in state and federal post-conviction proceedings. See *id.* at 8–9; Mills & Armstrong, *Tortured Path*, *supra* note 137; 60 Minutes II, *supra* note 151; see also *supra* note 151 (discussing the *Maxwell* case).

231. As Armstrong and Possley report:

[P]rosecutors rarely get punished [for concealing the truth in order to secure undeserved convictions], even if their conduct is outrageous.

A dramatic example is provided by the 381 homicide defendants who received new trials [in the United States between 1963 and 1999] because prosecutors hid evidence or allowed witnesses to lie. The appellate courts denounced the prosecutors' actions with words like "unforgivable," "intolerable," "beyond reprehension," and "illegal, improper, and dishonest." At least a dozen of the prosecutors were investigated by state agencies charged with policing lawyers for misconduct.

But . . . here is what has happened to the prosecutors in those hundreds of cases: One was fired, but appealed and was reinstated with back pay. Another received an in-house suspension of 30 days. A third prosecutor's law license was suspended for 59 days, but because of other misconduct in the case.

Not one received any kind of public sanction from a state lawyer disciplinary agency or was convicted of any crime for hiding evidence or presenting false evidence Two were indicted, but the charges were dismissed before trial.

. . . .

Instead, the prosecutor's career advances. In Georgia, George "Buddy" Darden became a congressman after a court concluded that he withheld evidence in a case where seven men, later exonerated, were convicted of murder and one was sentenced to death. In New Mexico, Virginia Ferrara failed to disclose evidence of another suspect in a murder case. By the time the conviction was reversed she had become chief disciplinary counsel for the New Mexico agency that polices lawyers for misconduct.

Armstrong & Possley, *Verdict Dishonor*, *supra* note 84; see also Armstrong & Mills,

and instead (3) the offending officials have been repeatedly promoted.²³²

Conviction Overturned, *supra* note 138 (noting that Cook County prosecutor David O'Connor, whose "infantile" behavior, "bickering, name calling," use of profanity, and other misconduct during a trial led the Illinois Supreme Court unanimously to reverse a police killer's capital conviction, had been criticized by a Supreme Court opinion five months before that trial for "degrading name calling and screaming" and for a "campaign of invective against a [capital] defendant, defense counsel, and witnesses who testif[ied] on behalf of the defendant"; in between the two decisions, O'Connor was promoted to chief of Chicago narcotics prosecutions); Armstrong & Possley, *Break Rules*, *supra* note 137 (reporting that despite repeated criticism by appellate courts and even a rare reprimand from a bar disciplinary commission based on a pattern of egregious misconduct in murder and other cases, Cook County prosecutor Carol Pearce McCarthy "received no internal discipline within the state's attorney's office" and instead was promoted and eventually elected judge; also reporting that supervisors in the Cook County state's attorney's office "can not recall a single case [from 1980 to 1999] where a prosecutor has been dismissed for trial misconduct," and that none of the 13 cases of misconduct that state and federal judges referred to bar disciplinary officials led to discipline); Armstrong & Possley, *Verdict Dishonor*, *supra* note 84 (concluding that because "appeals courts rarely name prosecutors" in opinions reversing convictions, and because many state appellate and post-conviction decisions are not published, "[w]rongdoing by prosecutors remains largely undetectable [by voters], with puzzle pieces scattered in warehoused trial transcripts and in court rulings that are hard to find or connect"); *supra* note 173 and accompanying text (discussing repeated re-election of Oklahoma District Attorney Robert Macy and New Orleans District Attorney Harry Connick despite numerous state and federal appellate court reversals based on egregious misconduct in capital and other cases handled by their staffs); *supra* note 229 (documenting the infrequency of investigations of prosecutorial misconduct).

232. The title of a *Chicago Tribune* article about the problem tells the story: "Break Rules, Be Promoted." The article reports that:

As Cook County prosecutors, Carol Pearce McCarthy, Kenneth Wadas and Patrick Quinn drew scathing rebukes from the Illinois Appellate Court for failing to abide by the rules designed to keep prosecutors honest and trials fair Collectively, the three prosecutors broke enough rules that nine defendants—four convicted of murder—were granted new trials But instead of having their career prospects suffer, all three prosecutors prospered. They were promoted to supervisor in the Cook County state's attorney's office. Then, on the same fall day in 1996, all three were elected judges.

Armstrong & Possley, *Break Rules*, *supra* note 137; see also *supra* notes 139–140, 194–197 and accompanying text (discussing political rewards for high death-sentencing prosecutors and judges, notwithstanding later findings of error). In another report, Armstrong and Possley discuss the record of former Cook County prosecutor Scott Arthur:

The story of Scott Arthur reflects, in many respects, a troubling side of the Cook County state's attorney's office. Winning is rewarded. Cheating goes unpunished.

A courtroom imposes rules of engagement. Arthur broke those rules [e.g., in capital and other homicide cases by "allowing a key witness to lie, making improper arguments, . . . engaging in abusive behavior towards defense attorneys and witnesses[,] . . . misle[ading] jurors, brush[ing] aside the judge, . . . [and] smear[ing] the defendant with innuendo that was unsupported by the facts"], but he continued to move up the office's ranks. . . . In the past two decades, appeals courts have hammered one Cook County prosecutor after another only to see that attorney promoted rather than reprimanded.

Armstrong & Possley, *Reversal of Fortune*, *supra* note 137. Based on its study of the aftermath of hundreds of judicial reversals of homicide convictions based on prosecutorial

Nor are post-conviction lawyers likely to seek sanctions or even publicize their victory over the prosecutor. Having just secured a reversal of their clients' convictions, their goal is to convince the district attorney to either drop the charges against their clients or accept a noncapital plea. The one thing they do not want to do is embarrass the district attorney with calls for punishment or an investigation.

Moreover, even in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame, and the public is likewise shielded from knowledge of the infrequent bar disciplinary action.²³³ There is also a systematic bias against identifying all the violations in a single case, because reviewing courts that find a single violation at a particular phase of a capital trial often forbear adjudicating other claimed violations at the same stage because the issues are moot.²³⁴ No less crucially, the "violation" found is almost *never* the substantive admonition that "you convicted an innocent man" or "sentenced someone

misconduct, the *Tribune* concluded that, "[w]inning a [homicide] conviction can accelerate a prosecutor's career, but getting rebuked on appeal will rarely stall it, contributing to a culture that fosters misconduct. And the deterrents that confront prosecutors are fearsome only in theory." Armstrong & Possley, *Break Rules*, supra note 137.

233. See Armstrong & Possley, *Break Rules*, supra note 137 ("When a court does overturn the conviction, it shields the prosecutor from embarrassment, omitting his or her name from the opinion or releasing its ruling in a way that few eyes ever see it."); see also id. ("Disciplinary and court records concerning . . . [prosecutorial mis]conduct are layered in secrecy or buried in obscure files."); Hunt, *Clouded Cases*, supra note 160 (reporting, based on study of court records, that Ohio Supreme Court has repeatedly criticized prosecutors for "a wide variety of errors in Hamilton County [Cincinnati] death sentences," but "almost never identifi[ies] prosecutors by name"). Even the "simple" task of discovering the names of judges, prosecutors, and defense lawyers found by appellate courts to have committed egregious misconduct in death penalty and other homicide cases is daunting and well beyond the capacity of most members of the public. To accomplish this feat, investigative reporters have had to undertake painstaking comparisons of the appellate decisions to docket sheets and trial transcripts. See Armstrong & Mills, *Justice Derailed*, supra note 84 (describing *Chicago Tribune's* November 1999 "comprehensive examination of all 285 death-penalty cases since capital punishment was restored in Illinois" in 1978, "which included an exhaustive analysis of appellate opinions and briefs, trial transcripts and lawyer disciplinary records, as well as scores of interviews with witnesses, attorneys and defendants"); Armstrong & Possley, *Verdict Dishonor*, supra note 84 (describing similar investigation in conducting national study of prosecutorial misconduct in homicide cases); Hunt, supra note 160.

234. See, e.g., *Blazak v. Ricketts*, 971 F.2d 1408, 1414 (9th Cir. 1992) (concluding that the district court is not obliged to decide petitioner's challenges to sentence after granting relief on challenge to conviction and ordering retrial or release because "an affirmation on appeal will obviate altogether the need for either the district court or this court to address Blazak's penalty phase claims"); *Clark v. Duckworth*, 906 F.2d 1174, 1179 (7th Cir. 1990) (reversing district court's grant of writ on one claim and remanding for consideration of other claim that district court failed to address); see also 2 Liebman & Hertz, supra note 42, § 35.1, at 1405-09 (noting that a majority of circuits that have addressed this issue follow the rule that if a district court has granted all the relief that a habeas petitioner seeks, it need not review additional claims seeking the same or lesser relief).

to die who didn't deserve that penalty,"²³⁵ but only that "you made a mistake of procedure" (ostensibly, the sole concern of most post-trial review), which officials back home can—and do—characterize in the press and in their own minds as a "technicality."²³⁶ And, whatever else is true, the penalty for error by *trial-level* prosecutors and judges never requires them to bear the huge financial costs of the lengthy post-conviction process that the error imposed on *state-level* states' attorneys and judges. Instead, the costs of reprosecution and retrial (1) are muted by the capacity to piggy-back on the original investigation and trial evidence, and either (2) are neutralized by the political and reputational benefits of being able to seek and secure yet another death (re)sentence (when the public is paying attention and the case remains winnable) or (3) may be avoided entirely by taking the plea bargain or dismissal that was rejected the first time around (if the public isn't looking or the case isn't winnable and the now-ancient error can be blamed on a prior administration). So, even in the rare event that there is someone back home who can be, and who is, singled out for a reversal penalty five or ten years after the fact, the penalty comes nowhere near canceling out the amortized rewards from generating the mistaken death sentence in the first place.

Finally, in some—probably large—number of "overproduced" cases, the deserved slap never comes, because the error eludes the reviewing courts.²³⁷ Even apart from the ever-mounting hurdles the Court and

235. Compare *Williamson v. Ward*, 110 F.3d 1508, 1517–22 (10th Cir. 1997) (granting capital sentenced petitioner Williamson a new trial based on ineffective assistance of counsel) with *Bill Dedman*, DNA Evidence Frees Two in Murder Case, *Milwaukee J. Sentinel*, Apr. 25, 1999, at 20 (discussing Williamson's later release due to innocence).

236. Consider, for example, the local prosecutor's reaction to a federal habeas judges' reversal of the death sentence in *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995), discussed *supra* note 170 and accompanying text:

Where's the fairness for the law-abiding citizens? How many appeals are you entitled to? The constitution demands finality of punishment.

Us good folks here in Tennessee are able to take care of our business in the criminal justice system. We're bright enough to understand the system. Once the Criminal Court has spoken, and the Tennessee Supreme Court has spoken, that's enough.

We don't need this guy telling us we're wrong. If he had to stand for election every eight years or so and let the people speak, we wouldn't be seeing opinions like this. We don't need a federal judge involved in our justice system. He needs to be held accountable for what he's doing.

Tom Chester, Prosecutor Lashes Judge for Reversal of Death Sentence, *Knoxville News-Sentinel*, May 21, 1994, at A1; see also Berlow, *Wrong Man*, *supra* note 84, at 67 (proffering an explanation for successive reprosecutions of an innocent defendant, Rolando Cruz, see *supra* note 143, for capital murder after the Illinois Supreme Court twice overturned his conviction on appeal—notwithstanding the confession to the crime by another man who was later linked to the offense by DNA tests that exonerated Cruz: "When that verdict was set aside, prosecutors probably satisfied themselves that the court's decision turned on nothing more than a technicality").

237. See *supra* notes 84, 91. Once someone is executed, there rarely is anyone left with the incentive and wherewithal to prove his innocence; organizations that pursue these kinds of cases will instead devote their resources to probably innocent prisoners who are

Congress have thrown in the way of meaningful review,²³⁸ and the myriad cases in which serious, even malicious, errors are spotted but elude reversal due to procedural defaults, harmless error analysis, and the like,²³⁹

still alive. Cf. Frank Green, *Diocese's Request for Evidence Denied: DNA Data in O'Dell Case Were Sought*, *Richmond Times-Dispatch*, June 16, 1998, at B1 (reporting unsuccessful effort by family members, lawyers, and religious leaders to get court to order the release of DNA evidence they believe would establish the innocence of executed Virginia prisoner Joseph O'Dell); Weinstein, *Many Resist DNA Testing*, *supra* note 118 (discussing prosecutorial resistance to post-conviction release of information probative of innocence). It consequently is necessary to extrapolate from the huge number of mistakes that *are* caught, from the resistance of officials to, and the foibles of the system for, catching them, and from the arbitrary means by which so many are caught, see *supra* note 84, to the likelihood that some mistakes are *not* caught. It also is very likely that some significant number of innocent individuals who were tried capitally but given life sentences, or whose death sentences were overturned, remain in prison on lesser convictions or sentences. See, e.g., Frontline, *supra* note 84 (discussing Earl Washington whose death sentence was commuted to life based on DNA and other evidence that seemed to demonstrate his innocence, but who remained in prison six years later). Because the services of anti-death penalty lawyers are rationed only to people serving death sentences, the incentive and resources available to prove the innocence of individuals removed from death row is very low. Even more important, innocence is a very underinclusive proxy for mistakes. See *supra* note 144. It is reasonable to suspect that many more mistakes take the form of first-degree murderers given undeserved death sentences, and homicide perpetrators convicted of a higher degree of crime than they committed. See generally James S. Liebman et al., *Death Matters: A Reply to Latzer and Cautben*, 84 *Judicature* 72, 74–75 (2000) (documenting these and other reasons why innocence-focused measures of miscarriages of justice in capital cases are inaccurate and underinclusive).

238. See Berlow, *Wrong Man*, *supra* note 84, at 68 (“Ironically, it is the safeguards [death penalty supporters] refer[] to—the often time-consuming constitutional and legal challenges to convictions and death sentences—that death-penalty supporters have successfully undermined during the past decade, thereby increasing the likelihood of executing an innocent person.”); *supra* notes 41, 50–74 and accompanying text.

239. See Armstrong & Possley, *Break Rules*, *supra* note 137 (“Between 1993 and 1997, there were 167 published opinions in which the Illinois Appellate Court or Illinois Supreme Court found that prosecutors committed some form of misconduct that could be considered harmless. In 122 of those cases—or nearly three out of four times—the reviewing court affirmed the conviction, holding that the misconduct was ‘harmless’”; also quoting conclusion of retired Illinois appellate judge Dom Rizzi, a longtime critic of courts’ and chief prosecutors’ tendency to ignore “troublesome pattern[s]” of prosecutorial misconduct, that “[i]f you do not reverse the conviction where there is prosecutorial misconduct . . . there is virtually no way you can be assured that the conduct will not repeat itself in other cases”); Hunt, *Clouded Cases*, *supra* note 160 (reporting, based on study of court records, that, although the Ohio Supreme Court “repeatedly has criticized [Cincinnati] prosecutors for making improper courtroom statements to win 14 death penalty cases over the past 12 years,” and “has written at least four lengthy opinions since 1988 telling prosecutors to stop the misconduct, the record shows justices are more than willing to forgive these mistakes and uphold death sentences” on grounds of a lack of prejudice—as the court has done in 13 of the 14 cited cases, with the 14th still under submission; also quoting Ohio high court’s chief justice stating: “We better stop complaining about it if we’re not going to do something about it.”); *Prosecutorial Restraint: Death Penalty Allows No Margin for Error*, *Columbus Dispatch*, July 15, 2000, at 6A (citing a number of recent capital cases in which the Ohio Supreme Court had “express[ed] frustration” and “‘mounting alarm’ over the increasing incidence of

the fact is that post-trial reviewing courts do not purport to be, would be excoriated if they claimed to be, do not want to be, and are not designed to be—even if, willy nilly, they end up acting as if they were—guilt-determiners and capital sentencers.

Often, therefore, no message about the substantive inaccuracy of death verdicts (no matter how egregiously inaccurate they are) is ever transmitted back to the responsible trial-level actors. And when the message is transmitted back, its power is dissipated by the light-years it must travel, the chain of transformers it has to go through, and the weakness and garbled nature of the original signal. So, if you were a prosecutor considering whether or not to seek a death sentence and whether to cut corners if necessary to get it, your mental calculus might go something like this: “Don’t seek a death sentence—very bad. Seek it and don’t get it—even worse. Seek it and cut corners to make sure I *do* get it—very good (emotionally, politically, professionally) in the short-run, with only a small chance of something mildly bad (happening many years later.” A similar calculus faces police officers, trial judges, and jurors—all of whom, like the prosecutor, are left virtually unconstrained by defense counsel at trial, and, as noted, may actually be let off the hook (by the predicted success of movement lawyers years later. As police officer, prosecutor, judge, or juror, what would *you* do?

4. *Maximized Benefits and Displaced Costs: The Role of the Capital Defense Bar.* — I have heaped a lot of blame for the overproduction of death on trial-level officials who fail to pay their way (i.e., to internalize the costs of their errors) in capital cases.²⁴⁰ But this allocation of blame is incomplete and potentially misleading. Although the death penalty debate is typically framed in terms of the monolithic capital sentencing state as a whole versus capital defendants and their movement lawyers, the above analysis reveals a far more complicated set of actors, alliances, and oppositions. For one thing, the anti-death penalty bar is effectively in league with overproducing trial-level officials, given the bar’s diversion of resources to the later stages of capital cases, leaving ill-prepared and poorly compensated lawyers to hold down the fort (or, more accurately, to be overrun) at trial.²⁴¹ Moreover, the supposedly monolithic state is in fact composed of two sets of actors—trial-level officials, who have relatively easy access to the benefits that accumulating death sentences provide, and appellate-level officials, along with victims and taxpayers, who bear

misconduct by prosecutors” and trial judges; in nearly all the cases, however, the error was found harmless and the death verdict was upheld); supra notes 46–47, 63, 66–67, 69, 91 and accompanying text. Waiver and procedural default rules typically are attacked because they leave violations of rights unremedied. See, e.g., Coyne & Entzeroth, supra note 175, at 28–30. Harmless error rules seem less controversial because they only apply where no or little harm was done to the bearer of the right. The analysis here makes clear that both types of rules are equally, and seriously, problematic, because both so often and seriously undermine the reversal penalty for trial-level mistakes.

240. See supra Parts II.C.2, II.C.3.

241. See supra notes 175–185 and accompanying text.

the heavy costs of defending, fixing, and culling those sentences and otherwise suffering their untoward consequences.²⁴² As abolitionists and the newspapers are fond of pointing out when the question is whether a non-capital state should adopt the death penalty, capital sentencing states in fact spend *excessively* on capital sentences—\$3.2 million per execution in Florida between 1973 and 1988, compared to \$855,240 for a 60-year sentence (in 1985 dollars); \$3 million per execution in Pennsylvania (three times the cost of incarceration for life without parole); \$2.16 million per execution in North Carolina, \$2.3 million in Texas, and \$5 million in California.²⁴³ In fact, when not only trial, incarceration, and execution costs are counted, but also the expense of post-conviction capital litigation, especially in the two-thirds or more of cases in which the result is to *overturn* capital sentences, the figure is much higher, perhaps upwards of \$20 million in extra expenditures for every person actually executed.²⁴⁴

242. At worst, crime victims pay with their lives for police and prosecutorial misconduct in capital cases. For example, 13 years after the Ford Heights Four were falsely convicted (two capitally) of two rape-murders, and four years before they were exonerated, one of the actual perpetrators, who was still at large, suffocated a third woman to death in a vacant apartment near the scene of the earlier crimes. See Armstrong & Possley, *Reversal of Fortune*, supra note 137. During the trial of the Ford Heights Four, prosecutors (1) presented false and misleading scientific evidence; (2) used a variety of undisclosed benefits to induce three witnesses to finger the defendants, then permitted the witnesses to lie about the inducements on the stand at trial; and (3) "capitalized on a weak front posted by defense attorneys who were often ill-prepared or incompetent." *Id.*; see also Masters, supra note 151 (discussing tactics Arlington, Virginia, police used to induce David Vasquez to give a false confession to a capital rape-murder, leaving the actual killer free to commit four more rape-murders before being apprehended); supra note 151 (discussing the Ochoa case).

243. See Kozinski & Gallagher, *Run-On Sentence*, supra note 85, at 11–15 & nn.45, 64 (citing studies and estimates for various states); Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. Davis L. Rev. 1221, 1245–66 (1985); Aaron Chambers, *Resources a Concern in Death Penalty Reform*, Chi. Daily L. Bull., Apr. 24, 1999, at 19; Paul W. Keve, *The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty*, Federal Probation, Mar. 1992, at 11, 13; Rosenberg, supra note 114, at 22; A. Wallace Tashima, *A Costly Ultimate Sanction*, The L. A. Daily J., June 20, 1991, at 6.

244. Consider the findings of a recent study by the *Palm Beach Post*:

What price for vengeance on society's worst killers? In Florida, try \$51 million a year. That, according to a [1999] Palm Beach Post estimate, is how much Florida spends each year to enforce the death penalty—above and beyond what it would cost to punish all first-degree murderers with life in prison without parole. And at the [slow] rate at which Florida is executing its killers (there have been only 44 since executions resumed in 1979), it's costing about \$24 million per electrocuted murderer. . . .

According to The Post's estimate, [life imprisonment] is about \$23 million cheaper, even for an inmate who is imprisoned in his 20s and dies in his 70s. The Post's figure was derived using estimates of how much time prosecutors and public defenders at the trial courts and the Florida Supreme Court, which devotes approximately half its time to death penalty cases, spend on extra work needed in capital cases. It accounts also for the time and effort expended on defendants who are tried but convicted of a lesser murder charge and whose death sentences are overturned on appeal as well as those handful of condemned inmates who are

These points—that trial-level officials fail to pay their own way when they seek death sentences, that anti-death penalty lawyers are complicit in the dodge, and that other state officials and taxpayers pay the price—can be unified into a single story that puts the anti-death penalty bar in the role of the chief villain: The reason states spend so much on capital *cases*, while spending so little on (at least the defense side of) capital *trials*, is the choice anti-death penalty lawyers have made about where to deploy their resources. On the one hand, they have deployed few of their own resources, and as a result have attracted few of the state's resources (especially on the defense side), into capital trials. On the other hand, they have deployed extensive defense resources into post-trial proceedings—in the process sucking into the same proceedings huge amounts of the states' responsive resources, many of which redound to the prisoners' and their lawyers' benefit in the way of expert assistance, disclosed files and other discovery, counsel fees, and the like.²⁴⁵

actually executed.

Date, *supra* note 85; see also Jonathan Alter, *The Death Penalty on Trial*, *Newsweek*, June 12, 2000, at 24, 34 ("California spends an extra \$90 million on its capital cases beyond the normal costs of the system."); *infra* note 246 (discussing cost of post-conviction litigation).

245. See, e.g., Alan F. Blakley, *The Cost of Killing Criminals*, 18 N. Ky. L. Rev. 61, 71–73 (1990) (estimating cost of state supreme court appeals in capital cases as of the late 1980s, and exclusive of travel, photocopying, investigation, and "court costs—the salaries of the justices and their aides—" as between \$120,000 and \$160,000 per case; certiorari thereafter costs the state about \$170,000); Garey, *supra* note 243, at 1262–66 (analyzing defense attorney expenditures in litigating capital appeals); Elias & Fried, *supra* note 85 (reporting that in California, which has several hundred state and federal post-conviction petitions pending at any given time, state courts as of 1999 were paying \$25,000 for prefilig investigation and a flat fee of \$72,000 to \$107,000 in counsel fees (plus an hourly fee for reading the transcript) for every capital state post-conviction petition litigated in the state; federal courts as of 1997 paid an average of \$370,000 in inmate litigation fees and expenses per capital habeas corpus case and upwards of \$1 million in some); Mintz, *California Gridlock*, *supra* note 91 (reporting that just the federal court portion of the average death penalty appeal in California costs \$700,000 per case to cover prisoners' litigation expenses and attorneys fees); Mintz, *Capital Punishment Gridlock*, *supra* note 124 (reporting that the state court portion of the average capital appeal in California costs "as much as \$315,000" per case in defense lawyer fees, "but officials still can't find enough attorneys for 564 condemned inmates" and have had to create a "15-lawyer resource center to represent death row inmates, coupled with the expansion of [the appellate capacity of] the state public defender's office"); Bill Sloat, *Public Defender's Office Says it Can't Afford Appeal*, *Clev. Plain Dealer*, Jan. 6, 2000, at 5B (reporting that after the Ohio statewide public defender office, with a 1999 budget of \$1.15 million for post-trial representation in capital cases, spent \$200,000 in an unsuccessful effort to stop the state's first post-*Furman* execution, it filed papers claiming that "a rash of death penalty cases left it unable to pay about \$12,000 for 3 expert witnesses" at an evidentiary hearing ordered by a federal habeas judge to explore "alleged racism in jury selection" and ineffective assistance of trial counsel); Dave Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, *Miami Herald*, July 10, 1988, at 12A (stating that post-trial costs of Florida capital appeals are from \$344,000 to more than \$1,160,000 higher than in noncapital cases); Vivian Wakefield, *Lawyer Wants Court to Weigh the Costs of Justice*, *Fla. Times-Union*, Apr. 3, 2000, at A1 (reporting on well-known Jacksonville lawyer's refusal to take death penalty appeal at going rate of \$50/hour—less than his overhead—given burden placed on his office by a

prior successful appeal in which he logged 545 hours, along with 105 hours of support staff time); Jonathan E. Gradess, N.Y. Public Defense Backup Center, Report to the N.Y. Senate Fin. Comm., Mar. 3, 1989 (estimating that New York direct appeals in capital cases would cost the state about \$246,000 per case); PriceWaterhouseCoopers, Cost of Private Panel Representation in Federal Capital Cases from 1992 to 1998, at III-23, V-79, VIII-119 (Feb. 9, 1999) (experienced federal habeas counsel "described the preparation required for an evidentiary hearing [in capital habeas cases] as similar to that required for an entire capital trial; such hearings are granted in from 40% to 89% of capital habeas cases in California); see also Woolner, *supra* note 131 (reporting that from 1993 to 1998, lawyers from the New York law firm of Sullivan & Cromwell spent "thousands" of uncompensated hours and "dozens and dozens" of unreimbursed trips to Georgia in the process of securing state post-conviction relief for Georgia death row inmate Scott Christenson). See generally Armstrong & Possley, Verdict Dishonor, *supra* note 84 (reporting results of study of 381 homicide convictions overturned based on prosecutorial suppression of evidence or presentation of false evidence and concluding that the "failure of prosecutors to obey the demands of justice—and the legal system's failure to hold them accountable for it—leads to wrongful convictions, and retrials and appeals that cost taxpayers millions of dollars [and] . . . fosters a corrosive distrust in [the judiciary]").

As for expenditures in time, as opposed to money, see, e.g., *Knight v. Florida*, 120 S. Ct. 459, 461–62, 465 (1999) (Breyer, J., dissenting from denial of certiorari) (noting that as of the end of 1997, there were 24 prisoners who had been on death row for more than 20 years; citing as examples the proceedings in the two cases before the Court—that of Florida death row inmate Thomas Knight (24-plus years on death row, including one year on direct appeal, eight years in state post-conviction proceedings, five and one-half years in federal habeas proceedings resulting in a grant of habeas relief, seven-plus years awaiting a retrial that resulted in a new death sentence, two more years on direct appeal, and one year on certiorari review in the Supreme Court), and that of Nebraska inmate Carey Dean Moore (19-plus years on death row, including two years on direct appeal, two years in state post-conviction proceedings, four years at the federal district court level on habeas during which relief was granted, four years on the state's appeals of that ruling, three years awaiting retrial resulting in a new death sentence, two more years on direct appeal, and two-plus years in state post-conviction proceedings and ensuing certiorari review)); *supra* notes 85, 96 (discussing court time devoted to capital appeals and length of those appeals).

Sometimes, a good bit of the blame for excessive state spending on capital post-conviction litigation falls on state's attorneys. See, e.g., *United States ex rel. Caver v. Gramley*, 1999 WL 261838, at *4 (N.D. Ill. Apr. 15, 1999) (decrying practice of Illinois state's attorney of filing motions to dismiss capital habeas petition on procedural grounds rather than responding on the merits, which "has unduly and unreasonably delayed resolution of the petitioner's discreet claims"); Weinstein, *Faster Appeals*, *supra* note 64 (discussing federal audit of expenses in capital cases, conducted by PriceWaterhouseCoopers, which found that unlike the state's attorneys in other states, who acquiesced after unsuccessfully raising a particular claim under a 1996 federal habeas statute, "the California attorney general's office has [unsuccessfully] litigated the [claim] . . . 'in every case,' i.e., in 40 death penalty cases, which, according to the accounting firm's rough estimation, "might have generated an additional \$100,000 in costs to taxpayers in each of the cases where [California] pursued the issue"). The Supreme Court and Congress may also bear some of the blame. See, e.g., *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1741 (1999) (Breyer, J., dissenting) (criticizing Court's ruling requiring federal habeas petitioners to exhaust state discretionary review procedure (akin to certiorari) that state law discourages prisoners from seeking, and predicting that ruling will "add to the burdens of already over-burdened state courts and delay further a criminal process that is often criticized for too much delay"); *Calderon v. Coleman*, 525 U.S. 141, 147–52 (1998) (*per curiam*) (Stevens, J., dissenting) (chiding majority for "needlessly prolong[ing] this [capital habeas] proceeding" by summarily reversing and remanding to

The problem thus is not that the state fights too hard for death sentences or that it never faces determined opposition to executions. Rather, the problem is that the determined opposition arrives so long *after* a death sentence occurs that it is inordinately easy for trial-level actors—especially given their unusually great motivation and capacity to cut corners when the case is capital—to secure what society should (and in the *end* does) treat as its most serious and difficult-to-justify sanction. The problem is not that state and federal governments do not pay dearly for a system that overproduces death sentences—they do, in financial terms,²⁴⁶

the court of appeals for additional harmless error analysis even though “our decision today is unlikely to change the result below” and “there is a strong interest in bringing all litigation, and especially capital cases, to a prompt conclusion”); *In re Page*, 179 F.3d 1024, 1027 (7th Cir. 1999) (Wood, J., dissenting from denial of rehearing en banc) (decrying myriad complications and conflicts among the circuits engendered by recent federal legislation that was designed to narrow federal habeas litigation, particularly in capital cases); *supra* note 124 (citing other examples). Compare *Knight*, 120 S. Ct. at 459 (Thomas, J., concurring in the denial of certiorari) (attributing 19- and 24-year delays in capital cases before Court to its “Byzantine death penalty jurisprudence”) with *id.* at 464 (Breyer, J., dissenting from denial of certiorari) (attributing delays to “the States’ failure to apply constitutionally sufficient procedures at the time of initial sentencing and to “extensive delays” in providing for “appeal and consideration of reprieve”).

246. See, e.g., Bright, Worst Lawyer, *supra* note 175, at 1838–39 (describing two cases in which defense lawyers were paid what amounted to \$15 to \$20 per hour and \$11.84 per hour to represent men who were sentenced to die but eventually were released as innocent after the expenditure of large sums of money by volunteer counsel in post-conviction proceedings); Armstrong & Mills, Inept Defenses, *supra* note 137 (“in Illinois, the resources rallied on appeal often dwarf those summoned to keep a defendant off Death Row in the first place”; for example, a trial judge trying a capital defendant—who was “a two-term Kankakee County Board member with colleagues eager to describe his accomplishments”—was, by his own admission, “‘totally amazed’ at how little evidence [trial counsel, retained for a flat fee of \$8000,] offered [in mitigation]” but, instead of stepping in to relieve the incompetent attorney, sentenced the defendant to die; the Illinois Supreme Court later overturned the death sentence after “Jenner & Block, one of Chicago’s largest and most prestigious law firms,” devoted “five lawyers, two investigators and an untold number of paralegals and support staff members” to seven years worth of appeals); Armstrong & Mills, Justice Derailed, *supra* note 84 (discussing the “staggering” costs of capital case reversals and exonerations in Illinois: “Taxpayers have . . . had to finance multimillion-dollar settlements to wrongly convicted Death Row inmates—[Dennis] Williams alone received \$13 million[—and] . . . to pay for new trials, sentencing hearings and appeals in more than 100 cases where a condemned inmate’s original trial was undermined by some fundamental error.”); Bales-tier, *supra* note 84 (reporting that, in the process of seeking state post-conviction relief for a possibly innocent death row inmate in Texas based in part on ineffective assistance of counsel by trial lawyers who spent “just three hours with [the client] in preparation for trial,” the New York law firm of Latham & Watkins has “devoted thousands of attorney hours to the project,” assigned a partner and associate to “work full-time on the . . . case for weeks at a time,” and “include[d those] pro bono hours in its calculations for bonuses”); see also Armstrong & Mills, Flawed Cases, *supra* note 114 (“Cook County agreed to pay a record \$36 million to . . . the Ford Heights Four, four men who had been wrongly convicted [two capitally] of the 1978 murders of a south suburban couple”; the men “alleged that sheriff’s officers framed them by manufacturing evidence of guilt while burying evidence pointing to the real killers”); Laurie Goering, Florida Lets Speed Govern Executions, *Chi. Trib.*, Feb. 28, 2000, at N1 (noting that the Florida legislature granted Freddie Pitts and Wilbert Lee \$1 million in

diluted deterrence and retribution, victims' unrequited hopes for closure-by-execution,²⁴⁷ and lost judicial opportunity and public support.²⁴⁸

damages for falsely incarcerating them on death row for 12 years (including 10 years after the actual killer confessed to the crime in a statement that police suppressed, see *supra* note 151)); Paul W. Valentine & Richard Tapscott, Md. to Give Cleared Man \$300,000, *Wash. Post*, June 23, 1994, at B1 (discussing legislative appropriation to Kirk Bloodsworth after DNA cleared him of a rape and murder for which he spent two years on Maryland's death row, then seven years in prison following an initial retrial).

Typifying the huge and needless expenditure of money and time on post-conviction efforts to save tainted capital judgments is Illinois's insistence upon defending the verdicts of all 14 men put on death row as a result of confessions taken by detectives at a notorious Chicago precinct house, notwithstanding that (1) the Police Department fired the supervisor of the unit for torturing a man whose capital conviction and sentence the state previously had spent \$1 million and five years defending—ultimately unsuccessfully, with the result that the police killer involved avoided the death penalty on retrial; (2) the Department has paid out more than an additional \$1 million dollars to settle civil suits growing out of torture claims against the unit in noncapital cases; (3) the Department's own Office of Professional Standards concluded in a series of reports that police officers in the unit had tortured at least two of the 14 men it put on death row and were guilty of "systematic" and "methodical" abuse in taking confessions; and (4) a state intermediate court and a federal district court have found that "[i]t is now common knowledge that . . . [the unit] regularly engaged in the physical abuse and torture of prisoners to extract confessions." *Mills & Armstrong, Tortured Path*, *supra* note 137; 60 Minutes II, *supra* note 151; *supra* note 151. Also typical are the post-trial litigation costs that had to be expended to force the Police Department, as late as 1999, to disclose its own internal investigative findings that officers in the unit tortured capital defendants into confessing. See *Mills & Armstrong, Tortured Path*, *supra* note 137.

247. A Seattle journalist reports:

Two years ago, the family of Tracy Parker was upset when a federal judge overturned the death sentence of the man convicted of her 1986 rape and murder. That disappointment turned to devastation yesterday when the . . . Court of Appeals took Brian Keith Lord's appeal a step further, ruling his trial attorneys did a shoddy job and ordering that he receive a new [guilt] trial. "I can't stand it; I can't stand it," Parker's mother . . . said, weeping. "We're left to deal with this . . ."

Carter, *supra* note 91. See also Kozinski & Gallagher, *Honest Death Penalty*, *supra* note 1 ("One worries about the effect on the families of the victims, who have to endure the possibility—often the reality—of retrials, evidentiary hearings and last-minute stays of execution for years after the crime."); Mintz, *California Gridlock*, *supra* note 91 (describing emotional toll of protracted appeals process on relatives of crime victims); Possley & Armstrong, *Flip Side*, *supra* note 137 (concluding, based on study of effects of prosecutorial misconduct in Illinois homicide and capital cases, that "the reversals exact a toll on victims and their families who are forced to come back to court, reopening sometimes barely healed emotional wounds"); Swofford, *supra* note 85 (documenting the "emotional toll . . . [on] a victim's family as they wait year after year for the execution of the killer of their [loved one]"); see also *infra* note 273 (quoting statements by members of murder victims' families about the impact on them of lengthy capital appeals).

248. A constant theme of the many investigative media reports cited here that expose mistakes and injustices in capital cases is the impugned integrity of capital courts and their processes. In November 1999, for example, the *Chicago Tribune* published a five-part series on Illinois's death penalty, which Republican Governor George Ryan credited with influencing him to declare an indefinite moratorium on executions in the state. See William Claiborne, Ill. Governor, Citing Errors, Will Block Executions, *Wash. Post*, Jan. 31, 2000, at A1. The *Tribune's* report began as follows:

It is just that (with the unwitting complicity of the anti-death penalty bar), the actors who incurred those costs (at great political, professional, and psychic advantage to themselves) are the only ones who are permitted for the most part to *avoid* paying for them.

Nor can death penalty lawyers solve the problem by simply redirecting their resources to the trial stage. Recall the problem of the pyramid.²⁴⁹ To concentrate their fire as successfully as they now do, death

Capital punishment in Illinois is a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken, a Tribune investigation has found . . .

The findings reveal a system so plagued by unprofessionalism, imprecision and bias that they have rendered the state's ultimate form of punishment its least credible.

Armstrong & Mills, *Justice Derailed*, supra note 84; see also Alexander & Chandler, supra note 91 ("Capital punishment in the Carolinas is so tainted with mistakes, inequities and incompetence that the system risks executing innocent people, while sparing some of the states' most vicious killers, an Observer investigation has found."); Armstrong & Possley, *Verdict Dishonor*, supra note 84 ("An [earlier, national] investigation by the Chicago Tribune found nearly 400 cases where prosecutors obtained homicide convictions by committing the most unforgivable kinds of deception. They hid evidence that could have set defendants free. They allowed witnesses to lie. All in defiance of law. . . . The premium is on winning, not justice . . ."); Berlow, *Wrong Man*, supra note 84, at 91 (deploring asserted unreliability of Texas's death penalty regime); *Evidence Clears Two: The Law Doesn't*, N.Y. Times, Nov. 26, 1995, at A28 (decrying ordeal of Oregon couple jailed despite evidently compelling exculpatory evidence because of limits on appeals based on newly discovered evidence); Mills & Armstrong, *Tortured Path*, supra note 137 ("When [police] investigations are tainted by credible charges that confessions were coerced, the integrity of a conviction suffers, and questions of guilt or innocence linger after the trial ends. In death-penalty cases, police misconduct undermines society's expectations that its harshest punishment will be meted out only with certainty."); Frontline, supra note 84 (alleging in public television documentary about conviction and failure to release innocent capital prisoners around the country, that "[t]he system is broken [because it] . . . can't correct its own mistakes and admit that it makes mistakes and give people an opportunity to protect them"—or, as one of the victims of a miscarriage of justice puts the point in the shot that ends the program, "I want to know why. I want to know why they did this to me for so long. And it's always going to be there. I don't think they could even start to explain to me why.").

A California journalist summarized as follows the "toll" taken on "[a]ll sides" by that state's post-trial review process in capital cases: "Victims' family members . . . are haunted for . . . years by cases that hang in limbo without a resolution"; the inmate's "wait for answers can be excruciating"; federal habeas proceedings on average cost \$700,000 per case in defense lawyer fees; the state faces "the prospect of retrying cases so old that witnesses and evidence [have] vanish[ed]"; and the state high court is so "overwhelmed by death penalty work" that it can write only one-line orders in death appeals (thus increasing the burden on subsequent federal court review), prompting the state's chief justice to call the review process "a blight on the system" over which he presides. Mintz, *California Gridlock*, supra note 91; see also Kozinski & Gallagher, *Honest Death Penalty*, supra note 1 (decrying costs current death penalty regime imposes on courts, victims, and taxpayers); Possley & Armstrong, *Flip Side*, supra note 137 (listing retrial costs imposed by reversals due to prosecutorial misconduct in homicide cases, including "cost in time and effort for investigators, defense lawyers, judges and jurors" and "[f]or the guilty, . . . another opportunity to go free").

249. See supra notes 125–135 and accompanying text.

penalty lawyers would have to accomplish an impossibly difficult predictive feat. They would have to identify beforehand—with considerable strategic hindrance from the state in the form of overcharging, under-settlement, over-death-qualifying, and the like—what their top-of-the-pyramid strategy now tells them with 100% accuracy: which murders will be charged as capital crimes, convicted as such, taken to capital sentencing hearings, and actually result in death sentences that are eventually affirmed on direct appeal. Even worse, they would have to abandon their thousands of current clients who were convicted and sentenced under the preexisting error-plagued regime.

III. SOLUTION: THE DIFFERENCE A CONSCIENTIOUS TRIAL-FOCUS WOULD MAKE

As noted in Part II, the incentives driving the nation's process of imposing and reviewing death sentences are skewed from stem to stern. The devil's bargain between death-sentence-prone prosecutors and trial-shy anti-death penalty lawyers has so thoroughly hollowed out the procedural constraints against unwarranted capital sentences that a prosecutor's decision to seek and a jury's decision to impose death says rather little about whether it is substantively deserved. Moreover, the cost of empowering a procedurally-focused review process to take an (awkward) stab at remaking those substantive judgments is more than a decade of time and millions of dollars in each case.

A. *Inadequate Solutions*

Most proposals for curing this problem are doomed to make it worse. Typically, those proposals aim merely to treat one or another procedural symptom at either the stern *or* the stem, without attacking the disease itself (the skewed incentive system) or its principal, substantive symptom (the overproduction of death). It is true that the post-trial phases of the death penalty process are far too lengthy and costly.²⁵⁰ But simply to decree that those phases henceforth take less time and money—as the governor and legislature of Florida recently attempted to do, adopting time limits and litigation restrictions (later ruled unconstitutional by the state's high court²⁵¹) designed to make happen in five years what has long taken fourteen²⁵²—is to order severe production deficien-

250. See *supra* notes 95–97, 244–246 and accompanying text.

251. See *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000).

252. The Florida law had repealed state supreme court rules governing post-trial review in capital cases and replaced the state's existing chain of review procedures on direct appeal, in (often successive) state post-conviction proceedings, and in Public Records Act litigation, with a unitary process. The law was intended to cause executions to occur within five years of death sentences and to prompt state courts "to impose sanctions" on prisoners and their lawyers who "[a]bused" the litigation process, "[r]aised a claim that a court has found to be frivolous or procedurally barred," or "[a]dversely affected the orderly administration of justice." Death Penalty Reform Act of 2000, sec. 17,

cies to go away by firing the quality control staff. It won't work.²⁵³ The production process will remain severely deficient.

§§ 924.395(1)(a)–(d), 2000 Fla. Sess. Law Serv. 00-3 (West). The law gave capital prisoners 180 days after the filing of their direct appeal brief to file a state post-conviction petition; barred all claims that were or could have been raised at trial or on direct appeal; forbade extensions of time, even if, for example, delays were the result of the state's illegal withholding of exculpatory evidence or a court's failure to compel legally required disclosure of public records; barred successive petitions unless based on previously undiscoverable evidence establishing a constitutional violation and the prisoner's factual innocence; and imposed strict time limits on the adjudication of state post-conviction and public records act petitions. See *id.* sec. 6, §§ 924.056(3)(a), (d), (5); *id.* sec. 9, § 924.059. See generally Sara Rimer, *Florida Passes Bill to Quicken Execution Pace*, N.Y. Times, Jan. 6, 2000, at A1 (describing the passage of the Florida legislation and the accompanying public debate). Other states are considering post-conviction review reforms similar to those abortively adopted in Florida. See, e.g., Yoji Cole, *Napolitano Wants to Find Ways to Speed Executions*, Ariz. Republic, Feb. 16, 2000, at B7 (discussing state attorney general's proposal "to streamline the [Arizona capital] appeals process"); Amy Green, *State Attorney General Wants Speedier Appeals for Condemned*, Associated Press State & Local Wire, Apr. 10, 2000 (reporting that "Tennessee's attorney general wants to reduce the number of appeals available to death row inmates"); Siegelman Seeks to Shorten Death Penalty Appeals, *Bulletin's Frontrunner*, Mar. 21, 2000, available in Lexis News Library, Wire Serv. Stories File (discussing proposals by Alabama governor and legislators "to speed up executions" by eliminating capital defendants' automatic right to appeal to the state supreme court); ABA Section of Individ. Rts. & Responsibilities, *State Legislative Activity Summary Selected Bills: 1999–2000*, at 3–4 (draft Oct. 1, 2000) [hereinafter ABA Legislative Summary] (on file with the *Columbia Law Review*) (describing proposed legislation to reduce appellate review of capital judgments in Alabama, Florida, and New Mexico).

253. A number of observers have commented on Congress's largely unsuccessful effort to truncate the federal post-conviction process via the Antiterrorism and Effective Death Penalty Act of 1996. See Fred Cheesman, II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 Law & Pol'y 89, 90, 95, 99, 105 (2000) (concluding based on statistical study that AEDPA has had "virtually no impact" on the number of habeas petitions filed and "almost complete lack of success" in moderating the burden such petitions place on state lawyers and the federal courts); Claire Cooper, *Death Penalty Rules Blasted*, Sacramento Bee, Apr. 15, 2000, at A1 ("[A] growing number of lawyers and judges say [AEDPA's] measures designed to improve efficiency are stalling appeals more than ever before."); Mintz, *Capital Punishment Gridlock*, *supra* note 124 (concluding that, four years after its enactment, AEDPA "has had little effect in states notoriously slow in processing death penalty appeals," and that "[i]f anything, its clunky language has further slowed capital cases . . . as lawyers and judges figure out how to interpret it[]"); *supra* notes 53–74 and accompanying text (discussing AEDPA generally and noting the extensive number of Supreme Court cases that the Act's poor drafting has generated). With regard to the failings of similar legislation passed in Texas a few years ago and in Florida last year, see *Defense Called Lacking*, *supra* note 178 (concluding, based on study of 461 Texas capital cases, "that measures put in place in 1995 to ensure that people facing the death penalty got at least an adequate defense," at the same time as the capital appeals process was being reformed and truncated, have "often" failed to have much effect); Lloyd Dunkelberger, *Florida New Death Penalty Law Rejected; State Supreme Court Justices Say the Reform Is an Unconstitutional Attempt*, Ledger (Lakeland, Fla.), Apr. 15, 2000, at A1 (discussing Florida Supreme Court's unanimous conclusion that Florida legislation truncating capital appeals interfered with judiciary's prerogatives in violation of the state constitution); Jim McBride, *Speedy Death Row Appeals Draw Fire*, Amarillo Globe-News, Jan. 29, 2000, at 1A (reporting on resolution

What it might do is make matters worse. If defense lawyers have a third of the time to discover and expose, and if courts have as little time to catch and cure, the same high number of errors, it is likely that fewer deficient capital judgments will be discovered, more innocent and undeserving prisoners will be executed,²⁵⁴ and more actual killers will remain free.²⁵⁵ Worse, deficient capital sentences will occur more often, because overzealous police and prosecutors will operate under even less discipline than before.²⁵⁶ Nor will anti-death penalty lawyers be able effectively to redeploy their resources to earlier stages of the process, because having to litigate each of their already piled-up cases and each new case three times faster will effectively triple their post-conviction dockets, and because their resources (already depleted by recent federal budget cuts²⁵⁷) may be spread even more thinly by prosecutors emboldened to file even more capital charges.

It also is true of course that the defense lawyers appointed to handle most capital trials are far too poorly qualified, prepared, and paid to assure reliable capital judgments. But to expect states simply to order that the trial of every capital case shall henceforth be more costly—the result of proposals to improve the quality of defense lawyering at capital trials²⁵⁸—is vainly to expect fiscally and socially conservative voters and legislators to act on faith in the frugality of anti-death penalty lawyers. It is unlikely that any such order will issue based only on the hope that increasing the cost of every capital trial²⁵⁹ will keep the anti-death penalty

unanimously adopted by northern Texas bar association calling on criminal defense attorneys to decline to accept court appointments to represent inmates facing the death penalty in post-trial litigation because of the absence of “meaningful review” in the state’s appellate courts). The analysis here suggests that fixing AEDPA’s “clunky language,” see also *supra* note 71 and accompanying text, will not solve the problem. Because so much error is structured into American capital judgments, simply decreeing that the error-correction system must move faster will not work. It is no surprise, therefore, that AEDPA has fallen short of expectations.

254. See *supra* note 84.

255. See *supra* note 242.

256. To be sure, this effect may be lessened somewhat because the admonitory message of judicial reversals will reach the offending officers and offices more quickly than before. Cf. *supra* notes 218–220 and accompanying text (discussing poor feedback from reversals under existing system due to delays during review process). But because the kinds of errors deserving the most admonition—most especially, prosecutorial suppression of evidence and other forms of evidentiary manipulation, see *supra* notes 148–160 and accompanying text—take the longest time to discover, the overall effect of the reform is likely to be the quicker discovery and cure of fewer, less serious, and more record-bound miscues. Any increased disincentive to commit error visible on the record (and those disincentives will remain weak for the reasons discussed *supra* notes 194–199, 218–239 and accompanying text, and because reviewing courts will be strapped for time to cure even these errors) will be more than offset by the increased incentives to cut corners using investigative and other tactics that are largely off the record.

257. See *supra* note 132 and accompanying text.

258. See, e.g., *infra* notes 279, 289 (describing various measures and proposals for improving the quality of defense attorneys during capital trials).

259. See *supra* note 246.

bar from directing as many resources as before into the process of reviewing capital sentences. As silly as it now is to pay a few thousand dollars per capital trial, then millions of dollars per post-trial review, most legislators will conclude it is sillier still to risk paying millions at both phases.

Concerns about the amount of resources currently expended on, and the power currently given to judges in, capital post-trial litigation will also probably block proposals to expand judges' ability to winnow cases effectively in the post-trial phases. This is true whether the goal is more scrupulous procedural review (as Senator Leahy and a bipartisan group of Representatives are currently proposing in Congress²⁶⁰) or more scrupulous *substantive* review (as, for example, Professors Carol and Jordan Steiker and Joseph Hoffmann have proposed²⁶¹). And in this instance, suspicious voters and taxpayers are probably right. By themselves, enhanced post-trial review processes (state or federal) will not rationalize the system, even if they catch more of its mistakes, because of the abysmally ineffective mechanisms for feeding back what is learned at the post-trial phases to the trial phase.²⁶² As with other piecemeal reforms, these would likely *aggravate* the incentives problem by more effectively drawing resources away from trials and into post-trial review—meaning more overproduction of death and more need for costly appeals.

To say that voters, taxpayers, and legislators are suspicious of proposals to pour still more public resources into the post-trial review process is not, however, to say that they are immune to increasing evidence that capital trials are generating inordinate numbers of flawed outcomes and miscarriages of justice that risk, among other serious harms, the ultimate horror of executing the innocent.²⁶³ On the contrary, as recent events in Illinois and elsewhere reveal, the public suddenly seems less willing than

260. See *infra* notes 279, 285.

261. See Joseph Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 *Tex. L. Rev.* 1771, 1796–1802 (2000) (promoting reinterpretation of the Eighth Amendment as it applies to capital cases to require not only reliable procedures, but also a judicial finding “at every stage of the post-trial proceedings” of a “moral certainty . . . that the defendant is, in fact, guilty” and that he “deserves to die”); Hoffmann & Stuntz, *supra* note 3, at 93–99, 108 (proposing that a defendant’s showing of probable innocence be recognized as a separate and preferred “track” for federal habeas review); Steiker & Steiker, *supra* note 216, at 414–21 (proposing stricter state court comparative proportionality review of death sentences on direct appeal). The fate of AEDPA’s “special” provisions for capital cases suggests that taxpayers and state policymakers are not anxious to put more resources into capital cases. Those provisions invited states to spend more money on their own post-trial review procedures in return for receiving more truncated federal post-conviction review of capital judgments. See *supra* notes 54–56, 64 and accompanying text. Four years have passed, but no state has yet been willing to spend the money. See *supra* note 64. But cf. *infra* notes 268, 298 and accompanying text (suggesting that better inducements to more rational reforms might be of greater interest to taxpayers and policymakers).

262. See *supra* Part II.C.3.c.

263. See *supra* notes 84, 89–94 and accompanying text.

before to tolerate the results of the overproduction of death, even while continuing to support the death penalty.²⁶⁴

264. This point is most dramatically illustrated by the moratorium on executions ordered by Illinois Governor George Ryan on January 30, 2000, because of the high rate of errors in Illinois capital judgments. See Claiborne, *supra* note 248:

Gov. George H. Ryan (R) has decided to effectively impose a moratorium on the death penalty in Illinois [by indefinitely staying all scheduled executions] until an inquiry has been conducted into why more death row inmates have been exonerated than executed since capital punishment was reinstated in 1977 "There are innumerable opportunities along the way for serious errors, and the governor wants to take a pause here," Ryan's press secretary, Dennis Culleton, said today.

See also Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1 ("Governor Ryan's announcement . . . met with little public criticism here, a measure of how public outrage over the wrongful convictions has changed the political landscape on the issue in this state."); Steve Mills & Ken Armstrong, *Gov. George Ryan Plans to Block the Execution of Any Death Row Inmate*, Chi. Trib., Jan. 30, 2000, at 1 (citing March 1999 poll showing that Illinois death row exonerations have prompted 54% of the state's voters to favor and only 37% to oppose a moratorium, notwithstanding that a majority support the penalty in the abstract; also noting that even before Governor Ryan acted, both the General Assembly and state supreme court had initiated studies of the death penalty); Henry Weinstein, *Support for Executions Declines*, L.A. Times, Sept. 15, 2000, at A26 (reporting results of August 2000 national poll conducted by a bipartisan group of pollsters finding that "53% of those surveyed said they favored a nationwide suspension of executions until a study is completed on the fairness of how the death penalty is used" and that only 29% were opposed). Spurred by events in Illinois, and by the Nebraska Legislature's even earlier adoption of a moratorium on executions (vetoed by the Governor) and commissioning of a comprehensive study of the state's death penalty (not vetoed), (1) the Governors of Florida, Indiana, and Maryland, the legislatures of Illinois and North Carolina, and the attorney general of Arizona have ordered studies of the fairness of some or all aspects of their states' capital sentencing procedures; (2) abolition and moratorium legislation is pending in Congress in regard to federal executions, see S.2463, 106th Cong. (2000) (introduced by Senators Russell Feingold and Carl Levin); H.R. 3623, 106th Cong. (2000) (introduced by Rep. Jessie Jackson, Jr., of Illinois); (3) legislation seeking a moratorium on state executions or a study of the state's death penalty system has recently been under consideration in Alabama, Arizona, Delaware, Indiana, Kentucky, Maryland, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Virginia, and Washington; (4) serious abolition campaigns are taking place in Kentucky, Missouri, New Hampshire, and Oregon. See, e.g., Paul Barton, *Efforts to Put Death Penalty on Hold Continue to Grow*, USA Today, July 6, 2000, at 5A (reporting on numerous grass-roots initiatives to abolish or impose a moratorium on the death penalty); John M.R. Bull, *Catholic Leader Urging Moratorium on Executions*, Pitt. Post-Gazette, Feb. 28, 2000, at D1 (discussing Cardinal Anthony Bevilacqua's testimony in favor of a moratorium before a Pennsylvania legislative committee); Richard Carelli, *Optimism on Death Penalty Moratorium*, Associated Press, Feb. 12, 2000 (detailing the growing support for state and federal death penalty moratoriums); Warren Cohen, *Putting a Hold on Executions: Nebraska May Study Wrong Convictions*, U.S. News & World Rep., May 31, 1999, at 29 (describing Nebraska Legislature's approval of a moratorium on executions); Spencer Hunt, *Plea to Suspend Death Penalty*, Cincinnati Enquirer, Sept. 20, 2000, at B2 (describing hearing on bill in Ohio legislature to suspend executions pending a study); Claudia Kolker, *Death Penalty Moratorium Idea Attracts Even Conservatives*, L.A. Times, Aug. 29, 2000, at A5 (reporting that numerous death penalty moratorium groups "have sprouted up nationwide" since January 2000 and that "[t]wenty-seven local governments have urged moratoriums, five states are sponsoring death penalty studies and

religious leaders are paying new attention to the debate"); Paul Schwartzman, Glendening Proposes Study of Executions, *Wash. Post*, Feb. 9, 2000, at B2 (discussing Maryland governor's decision to set aside \$250,000 in his budget to study whether the death penalty "is being imposed fairly and without racial bias"); Peter Smolowitz, Death Penalty Moratorium to Be Pushed. Legislator: Study Panel Has Votes, *Charlotte Observer*, Sept. 16, 2000, at 1A ("An influential [North Carolina] state senator said Friday he expects his legislative panel, which is studying capital punishment, to recommend a moratorium on executions until it can be determined that the death penalty is fair."); Stolberg, *supra* note 171 (discussing the expanding agenda of a North Carolina legislative commission studying the death penalty); Robert Tanner, Ill. Give [sic] Death Penalty Critics Hope, *Associated Press*, Feb. 1, 2000 (discussing the status of state moratorium proposals); ABA Legislative Summary, *supra* note 252, at 1-3 (listing legislative proposals in 1999 and 2000 to declare moratorium on, study, or abolish death penalty). Numerous commentators have noted and contributed to important shifts in the death penalty debate. See, e.g., ABC This Week, Roundtable Discussion of the Death Penalty Moratorium (ABC television broadcast, Apr. 9, 2000) (transcript on file with the *Columbia Law Review*) (discussing events of week of April 3, 2000, with regard to the death penalty, including (1) op-ed by conservative columnist and long-time death penalty supporter expressing certainty that innocent prisoners have been executed and calling for curbs on government power to impose the death penalty, see George F. Will, Innocent On Death Row, *Wash. Post*, Apr. 6, 2000, at A23; (2) expression of support by another long-time death penalty supporter, Rev. Pat Robertson, for temporary moratorium on executions because of its unfairness to the poor and minorities; and (3) discovering that all four round table participants, representing a wide range of the political spectrum, have sympathy for the moratorium idea, revealing a "tectonic shift in the politics" of the death penalty); E.J. Dionne, Jr., The Right Gets Edgy About Capital Punishment, *Newsday*, June 28, 2000, at A38 (describing "the willingness of more and more conservatives to express their doubts about a policy that, after all, gives the government the right to take a life" as "[t]he most important shift in the death penalty debate": "Many who have made 'limited government' the cause of a lifetime are starting to wonder how the death penalty advances that goal."); John Harwood, Bush May Be Hurt by Handling of Death-Penalty Issue, *Wall St. J.*, Mar. 21, 2000, at A28 (noting "remarkable . . . absence of public protest" when Governor Ryan declared the Illinois moratorium on executions and discerning "a national shift in the politics of capital punishment"); Steven A. Holmes, Look Who's Questioning the Death Penalty, *N.Y. Times*, Apr. 16, 2000, § 4, at 3 (discussing various prominent conservatives' recent expressions of skepticism about the death penalty); Elizabeth A. Palmer, The Death Penalty: Shifting Perspectives, 58 *Cong. Q. Wkly.* 1324, 1324 (June 3, 2000) ("Rep. Henry J. Hyde is no bleeding heart liberal. So his support for a fresh look at the fairness of the death penalty shows just how much the debate has shifted in recent years."); Robert Reno, Support for Death Penalty Goes Wobbly, *The Des Moines Reg.*, June 12, 2000, at 7 (quoting statement by conservative commentator and former political candidate Oliver North that "I think capital punishment's day is done in this country. I don't think it's fairly applied."); Bruce Shapiro, Capital Offense, *N.Y. Times*, Mar. 26, 2000 (Magazine), at 19 ("[D]eath row innocence cases" have pushed "capital punishment . . . [toward] a political tipping point").

Public support for the death penalty has declined rather dramatically from 80% in 1994 to 66% in 2000 (a 19-year low), with public opposition having reached a 20-year high. See, e.g., Jeffrey M. Jones, Slim Majority of Americans Think Death Penalty Applied Fairly in this Country (visited Aug. 11, 2000) <<http://www.gallup.com/poll/releases/pr000630.asp>> (on file with the *Columbia Law Review*) (reporting that a Gallup poll conducted June 23-25, 2000, shows that 41% of Americans believe the death penalty is applied unfairly; only 51% believe it is applied fairly; "28% of Americans support the death penalty unconditionally, 37% support it with reservations, and 26% oppose it outright"); Frank Newport, Support for Death Penalty Drops to Lowest Level in 19 Years, Although Still High at 66% (visited Aug. 11, 2000) <<http://www.gallup.com/poll/releases/>

Nonetheless, the proposals to tighten standards and penalties for illegal police and prosecutorial tactics in capital cases²⁶⁵ that these concerns are generating are also unlikely by themselves to solve the overproduction problem. Law enforcement officials don't commit these infractions for fun; they do so because of an incentive structure that handsomely rewards each additional death sentence, however obtained. And just as officials will be tempted to pursue additional death sentences by crook if they can't get there by hook, they will be tempted to resort to new means (crooked or otherwise) if existing ones are made more costly. To work, reforms must instead force trial-level officials to bear the costs of the undeserved capital sentences that result from all such tactics—legal as well as illegal—and they must do so without imposing duplicative costs on the post-trial phases.

B. *Overhauled Incentives*

To succeed, reform efforts must realign the incentives of all the key players at the pre- and post-trial phases of the capital process. The goal is threefold: (1) to make it possible for the capital defense bar from the start to identify the "real" capital prosecutions in which their services are needed and on which their resources should be concentrated; (2) in this way to make it possible for states, and rational for defense lawyers, to divert to the trial phase some of the resources they now lavish on the post-trial phases; and (3) in this way to make it costly for police and prosecutors to pursue marginal, and to obtain undeserved, capital judgments. Although there is a role for nearly all the reforms discussed in the preceding section, the trick is to implement them all (and others) *simultaneously*, with a commitment on all sides to a process that accurately identifies from the start the few cases (many fewer than before) with demonstrated facts that indubitably warrant the death penalty according to the particular jurisdiction's substantive lights.

The pitfalls along this road are immense, and I take it with great trepidation. As is shown above, there are numerous temptations and opportunities for both sides to cheat—if only defensively, believing that the other side will do so. Pro-death penalty ideologues will resist agreeing to fewer death sentences and executions; front-line government actors will resist giving up a political-capital machine that is the stuff of fairy tales; anti-death penalty ideologues will resist a system with the avowed goal of permitting some (even a small number of) executions; and anti-death penalty lawyers will resist forsaking a post-conviction system that adds eleven years on average to each of their clients' lives and overturns two-thirds of their clients' death sentences.²⁶⁶ Moreover, a sure-fire means of

pr000224.asp> (on file with the *Columbia Law Review*) (detailing survey results showing drop in public support for the death penalty).

265. See *supra* notes 148–160 and accompanying text; *infra* note 289.

266. These lawyers will resist on behalf of each of their post-conviction clients, even if they believe (which they likely will not) that the aggregate number of clients reaching the

sabotaging the reforms will always be at hand, namely, a "compromise" on virtually any variant of the partial measures discussed in the preceeding section. As is discussed there, under existing circumstances, the usual political outcome of half a loaf is almost surely worse than no change at all.

That trepidation prompts me to bind together all of the various parts of *my* proposed solution into a single, presumptively unseverable package. That proposal is as follows.

Federal legislation would invite states to opt into a capital punishment system subject to ten requirements that are set out below. States would sign a formal declaration to signify their opting-in.²⁶⁷ In return, the law would permit states to suspend all state post-conviction remedies, and would suspend all federal post-conviction remedies except time-limited federal circuit court review (or, if the circuit court decides an evidentiary hearing is required, time-limited federal district court review) of claims alleging that the state violated one of the ten requirements.²⁶⁸

post-conviction stage (albeit with less vulnerable capital sentences) will decline substantially.

267. This declaration would make clear from the outset the contractual nature of the state's undertaking, through which it agrees to fulfill its potentially quite costly obligations (e.g., adequately compensating qualified lawyers; forsaking death sentences in cases in which it fails to abide by one of the ten requirements, which may seem, at the time, like mere "technicalities") in return for benefits that it concludes are worth those costs. Each state may design its own declaration.

268. Time limits would consist of a six-month statute of limitations on filing, following the end of direct review and certiorari proceedings, and a presumptive 10 month (one-year, if a hearing is held) adjudication limit. See 2 Liebman & Hertz, *supra* note 42, § 28.3d, at 1192 n.111 (discussing federal court practice of treating such time limitations on adjudication as nonmandatory); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. Rev. 761, 798-810 (1997) (discussing the constitutional reasons to make time limits on adjudication presumptive only).

Certiorari review of all court of appeals (or district court) decisions would be preserved. Cf. *Felker v. Turpin*, 518 U.S. 651, 654 (1996) (noting constitutional problems that might arise if Supreme Court review of post-conviction proceedings in the lower federal courts were barred).

Despite the suspension language, this proposal would not violate the Suspension Clause because of the capacity that remains for meaningful post-trial review via the beefed-up direct appeal certiorari process and via federal review of states' compliance with the 10 requirements. See 1 Liebman & Hertz, *supra* note 42, § 2.4e, at 83 n.326. The suspension language is intentional, however. It indicates how much states would gain in the way of reduced post-conviction litigation, adjudication, and "delay" if they opt into the proposed regime. This proposed "carrot" contrasts sharply with AEDPA's puny and unsuccessful inducement to states to opt into its regime of narrowed federal habeas review of capital judgments in return for spending additional money on state post-conviction counsel. See *supra* notes 54-74, 261 and accompanying text. For one thing, AEDPA made its most inviting review-truncating reforms available "for free" to all states in all cases (capital and noncapital), thus giving capital punishment states little reason to spend a lot more money to secure relatively little additional truncation. See *supra* notes 64-74 and accompanying text. In addition, AEDPA encourages states to spend more money, not on trials, but on state post-conviction proceedings, thus irrationally continuing to draw resources away from

The remedies for more than de minimus violations of any of the ten requirements in the process of securing a death sentence²⁶⁹ would be (1) automatic forfeiture of the death penalty and imposition of the highest alternative sentence available under state law, and (2) imposition of the costs of litigating and adjudicating the violation on the government entity that committed it. The ten requirements, satisfaction of which would be the state's responsibility to document,²⁷⁰ are:

1. *120-day Deliberation Period.* — The prosecutor must wait 120 days after indictment before announcing a decision to prosecute the case capitally, at which time the lead prosecutor on any case charged capitally must file a report with the district attorney, the state attorney general, and the defense, justifying the capital charge.²⁷¹ The report must iden-

trials. That taxpayers have been loath to move still further in the wrong direction is not necessarily indicative of their willingness to spend additional resources on reforms that are more likely to be productive.

The system of truncated review proposed here obviously cannot be applied to capital judgements imposed under the preexisting regime. Because close to 4000 death row inmates have judgements in that category as of now, see Figure 1, *supra*, their cases will continue—potentially for many years to come, see *supra* notes 96, 219, 245 and accompanying text—to draw large amounts of resources into the preexisting post-trial review process and away from a new, trial-centered system. To shrink this backlog and facilitate the transition to a new system, states could either (1) offer *all* capital inmates awaiting review the chance to accept a lesser penalty in return for dropping their appeals or, if that is thought to be too indiscriminate a windfall, (2) establish administrative procedures for quickly indentifying the weaker cases for execution among those awaiting review—perhaps in proportions roughly equal to the state's historical (e.g., post-*Furman*) combined direct appeal, state post-conviction, and federal habeas reversal rate for capital cases—and offer just *those* inmates the chance to avoid execution in return for dropping their appeals.

269. This component does not contemplate harmless error review. The question would not be whether the violation affected the outcome, but simply whether any requirement was more than minutely neglected.

270. See *infra* note 298 and accompanying text.

271. This type of provision, see N.Y. Crim. Proc. Law §§ 250.40, 400.27, 470.30 (McKinney Supp. 2000), together with adequate funding for expert trial counsel, limited the number of capital prosecutions in New York during the five-year period following reinstatement of the death penalty in 1994 to 37, and limited the number of death sentences during the period to five. See *supra* note 191; see also Raymond Bonner & Marc Lacey, U.S. Plans Delay in First Execution in Four Decades, N.Y. Times, July 7, 2000, at A1 (explaining that before seeking the death penalty, U.S. Attorneys must secure approval from the Attorney General via a formal procedure requiring prosecutors in every potentially capital case “to send a memorandum to the Justice Department, with a recommendation on whether or not [a death sentence] should be sought,” which is reviewed by a committee that reports to the Attorney General; the procedure gives defense counsel a chance “to make a presentation to the federal prosecutor . . . and then to the Justice Department review committee, two levels of protection that do not exist for a defendant in state capital cases”); Rosenberg, *supra* note 114, at 42 (noting practice among Pittsburgh prosecutors of carefully weighing aggravating and mitigating circumstances before deciding whether to seek the death penalty); Willing, *Prosecutor Determines*, *supra* note 138 (noting practice of Jacksonville, Florida, district attorney Harry Shorstein and Austin, Texas, district attorney Ronnie Earl to forgo charging cases capitally except on the advice of well-informed committees of assistant district attorneys); cf. Rosenberg, *supra*

tify the facts making the offense death-eligible under state and federal constitutional law, the aggravating circumstances to which the state will be limited at trial, the reasons why the level of aggravation net of mitigation warrants a death sentence, and the evidence warranting near-certainty on each of those points. During the 120-day period, the district attorney (a) must inform defense counsel of these same factors and give counsel a meaningful opportunity to convince the district attorney to settle the case or at least not to proceed capitally,²⁷² and (b) must give any members of the victim's family that the district attorney consults on the charging decision written notice of (i) how frequently death sentences in the United States, the state, the county, and the relevant trial court, and ones handled by the relevant prosecuting office, have actually resulted in execution; (ii) the average time from death sentence to execution in those jurisdictions; and (iii) the error and risk rates defined in item 10 below.²⁷³

2. *Open Files.* — The police and prosecution must make full disclosure to the defense before trial (and thereafter, if new information is obtained, through the trial, direct appeal, and post-conviction phases of the case) of all relevant information known to them, inculpatory or exculpatory.²⁷⁴ The disclosed information must include the criminal records of,

note 114, at 24 (describing Pennsylvania's Rule 352 requiring prosecutors to fill out a special form in all cases they decide to pursue capitally, which explains their decision; currently, the form is used only to inform defense counsel of the prosecutor's intentions, but there is no reason why a similar document could not also be used for purposes of statewide comparisons of prosecutorial practices).

272. On the important contribution that plea bargaining can make to the process of avoiding miscarriages of justice, see Gross, *Lost Lives*, *supra* note 84, at 142–45; *supra* notes 90, 171 and accompanying text.

273. See Alex Fryer, *Victim's Family Wrestles Death-Penalty Issue*, *Seattle Times*, May 14, 2000, at B1 (reporting conclusion of adult children of elderly Seattle murder victim—whom prosecutors said they would consult before deciding whether to seek a death sentence and who said they favor the death penalty in the abstract and consider it the appropriate punishment for their mother's killer—that they *oppose* a capital charge “because it takes too long and costs too much,” because “[i]f [the defendant] does get the death penalty, and it's 10 to 12 years of waiting, I don't know what good that does,” and because “I used to wonder why it took 10 or 12 years, but it's obvious when you see all the mistakes in [capital cases in] Illinois, you have to be careful”); cf. Mintz, *California Gridlock*, *supra* note 91 (quoting the brother of a murder victim of California death row inmate Darrell Rich, 22 years after the killing: “We figured it would take a couple of years for appeals . . . Boy, were we wrong.”).

274. See, e.g., Ken Armstrong, *Ex-Justice Favors Identifying Wayward Prosecutors*, *Chi. Trib.*, Jan. 11, 2000, at N1 [hereinafter *Armstrong, Wayward Prosecutors*] (discussing legislative testimony of a former Illinois Supreme Court Justice supporting “open-files policies adopted by some [Illinois] state's attorney's offices . . . under which prosecutors let defense attorneys see all the investigative reports and other records in the prosecution's files”). In describing to the United States Supreme Court, in *Michael Williams v. Taylor*, 120 S. Ct. 1479 (2000), his successful efforts to keep a capital prisoner from obtaining potentially exculpatory information in state files, Donald R. Curry, Senior Assistant Attorney General in charge of capital litigation in Virginia, exemplified the contribution closed files and close-to-the-vest policies make to poorly informed decisionmaking at trial

and must notify the defense about all criminal matters pending against, the recent sentencing history of, all plea discussions with and benefits afforded to, and the informing history of, all state witnesses.²⁷⁵

and to extended litigation thereafter. Williams was convicted of capital murder and sentenced to die based almost exclusively on the testimony of Jeffrey Cruse. Cruse admitted that he and Williams robbed and raped the victims, that he fired at least one shot into the victims, and that he tried to pin the rape on Williams until serological analysis had showed that he (Cruse) also raped the victim. Cruse nevertheless claimed that Williams was the prime mover who fired all of the potentially fatal shots and that he, Cruse, had no understanding with the state that he would avoid the death penalty (as he did) if he testified against Williams. See *Williams v. Taylor*, 189 F.3d 421, 424, 428–29 (4th Cir.), rev'd, 120 S. Ct. 1479 (2000). In his Supreme Court brief, Curry admits that at the time of Cruse's sentencing following a guilty plea—which occurred between the dates when the jury pronounced Williams' verdict of death and when Williams was formally sentenced—Williams' lead prosecutor received a state psychiatrist's report stating that Cruse had told the psychiatrist before both trials that he was so drugged and drunk at the time of the offense that he did not remember what he and Williams had done. See Brief of Respondent, 2000 WL 126196, at *34–*38 nn.26–28, *46 n.38, *Williams v. Taylor*, 120 S. Ct. 1479 (2000) (No. 99-6615). Despite obtaining this evidence that Cruse had told drastically different stories about his memory of the killings to different government agents before trial, the prosecutor recommended that the trial judge sentence Cruse to life imprisonment, which the judge did. See *id.* at *43. And the prosecutor never informed Williams or his attorney of the psychiatric report. See *id.* at *29. Instead, when Williams' new lawyer asked Mr. Curry during state post-conviction proceedings to turn over all psychiatric reports and other exculpatory evidence relating to Cruse and to make Cruse available for counsel to interview, Mr. Curry responded (1) that because the proceeding no longer was, technically speaking, a criminal case but instead was a "civil, habeas proceeding," he had no obligation to—and would not—search for or turn over exculpatory evidence in the state's possession; (2) that because the file in the case was the product of a criminal investigation, he would follow the usual practice in criminal cases of refusing to provide "informal discovery" of the sort that typically occurs in civil cases, and would (as he successfully did) oppose all motions for discovery; and (3) "that Cruse is incarcerated in an out-of-state location and that his location would not be disclosed to Williams" or his counsel in order to protect Cruse from Williams. *Id.* at *34 n.26, *46 n.38.

275. See, e.g., *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000) (on rehearing) (responding to reversal of double-murder conviction and death sentence due to misuse of dubious jailhouse informant by adopting a rule requiring all prosecutors in the state who intend to use the testimony of a jailhouse informant to disclose (1) the informant's criminal background, (2) any deal made with the informant, (3) the alleged confession by the defendant to the informant, and (4) all other cases in which the informant supplied any information, and by requiring trial courts to give a strongly worded cautionary jury instruction; court, however, recinds prior decision's additional requirement of a reliability hearing before jailhouse informants would be permitted to testify for the prosecution); Mills & Armstrong, *Inside Informant*, *supra* note 137 (reporting that, in the wake of a series of informant scandals in California, the Los Angeles district attorney has "set up a clearinghouse to monitor and centralize information about jailhouse informants and [has] required prosecutors to corroborate informant statements"; the California courts also now require a "special instruction warning jurors to view a jailhouse informant's testimony with skepticism"). Despite the presumptive requirement that all evidence in the prosecution's hands be disclosed, there might be some need for narrow exceptions for privileged or inculpatory evidence, where the public interest in nondisclosure is compelling and the defendant's interest in disclosure is slight.

3. *Videotaped Confessions*. — At trial, the prosecution may not introduce inculpatory statements made by the defendant while in custody unless the statements, and all interrogations leading up to them, were videotaped and the videotapes have been turned over to the defense.²⁷⁶

4. *Adequate Defense Counsel and Support Services*. — States must (a) adequately compensate²⁷⁷ defense lawyers for indigent defendants for work performed from the initial charging through trial, direct appeal, and the filing of any timely post-trial motions based on innocence,²⁷⁸ (b) select lawyers from a roster of state or nationally “board-certified, experienced, and continuously peer-reviewed” capital-punishment lawyers,²⁷⁹ and (c) adequately fund all reasonably necessary defense support services by independent professionals, including investigation, expert advice and testimony, and forensic (including DNA) analysis.

276. See Ryan Keith, Task Force on Capital Cases Calls for Videotaping of Suspects, Chi. Trib., Mar. 16, 2000, at M6 (reporting on an Illinois Senate task force recommendation that all police interrogations of suspects accused of serious felonies and potentially capital offenses be videotaped); cf. *supra* note 151 and accompanying text (giving examples of use of forced or manufactured confessions to secure capital convictions).

277. A fee schedule would be set by the U.S. Department of Justice or the Administrative Office of the U.S. Courts.

278. The existing federal provision mandating appointment and adequate funding (at federal expense) of federal post-conviction lawyers in capital cases would be retained. See 21 U.S.C. §§ 848q–848r (1994).

279. See Carol Marbin Miller, Florida High Court Raises Standard for Death Row Case Lawyers, Miami Daily Bus. Rev., Nov. 5, 1999, available at <www.floridabiz.com/expcfm/display.cfm?id=22666> (discussing adoption by Florida Supreme Court of rules setting minimum standards for defense attorneys in capital cases; lead capital defense attorneys must have at least five years trial experience in criminal cases, including at least nine jury trials in serious or complex matters and at least two capital cases; trial judges are encouraged but not required to appoint two defense lawyers in each case); Maurice Possley & Ken Armstrong, Revamp Urged in Handling of Capital Cases, Chi. Trib., Nov. 4, 1999, at N1 [hereinafter Possley & Armstrong, Revamp Urged] (reporting that at least a dozen states “have established minimum standards for defense attorneys in capital cases,” which typically “require that at least two attorneys be appointed in capital cases and that they have a certain number of years of experience in trying criminal matters”); *supra* note 191 (discussing provisions to assure competent capital representation in Colorado, Connecticut, Indiana, New Jersey, New York, and Ohio); see also Mike Dorning, Death Penalty Reforms Gain Backers in D.C., Chi. Trib., Mar. 31, 2000, at N1 [hereinafter Dorning, Reforms] (describing bipartisan support in the U.S. House of Representatives for a bill, parallel to one proposed in the Senate by Patrick Leahy, to improve capital defendants’ access to evidence of innocence, adequate representation, and other protective procedures); Mike Dorning, Senator to Propose Death Row Safeguards, Chi. Trib., Feb. 10, 2000, at N1 [hereinafter Dorning, Safeguards] (describing federal legislation proposed by Vermont Senator Patrick Leahy that would, *inter alia*, give states incentives to “require that indigent death penalty defendants be allowed a team of at least two court-appointed attorneys” who “meet competency standards set by the U.S. Administrative Office of the Courts”); Jack Elliot, Death Row Defense Bills Move Through Legislature, Biloxi Sun Herald, Mar. 2, 2000, at A5 (discussing proposals in the Mississippi legislature to provide state money to assist smaller Mississippi counties to bear the expense of competent trial and state post-conviction representation in capital cases).

5. *Death-Neutral Guilt-Phase Juries*. — States may not use death-qualified juries at the guilt phase of capital trials.²⁸⁰ Although prosecutors could continue to remove jurors who could or would not sentence anyone to die from the penalty phase jury, this reform would take away their existing incentive to charge marginal cases capitally in order to secure a death-qualified jury and in that way improve their chances of convicting the defendant of a capital murder.²⁸¹

6. *Truth in Sentencing*. — Trial courts must (a) give jury instructions (if timely requested by the defense) that fully and accurately inform the jurors of the minimum length of time murderers must serve before being eligible for parole;²⁸² (b) notify jurors ahead of time that, if the verdict is death, each will be required to state in court that it is his or her judgment beyond a reasonable doubt that death is the appropriate punishment; and (c) forbear making statements or giving instructions suggesting that the jurors' verdict will or may be reviewed or reconsidered by anyone else or that any sentence they impose will or may be overturned or commuted.²⁸³ Prosecutors also, of course, must forbear making arguments that are inconsistent with any of these requirements.

7. *Substantive State Court Review of Capital Judgments*. — On direct appeal, (a) state high courts must conduct meaningful, substantive, comparative proportionality review of all capital judgments in the state;²⁸⁴ (b) their review must be informed, inter alia, by periodic reports of the state

280. See supra notes 163–164 and accompanying text (describing the existing practice of “death qualifying” juries in capital cases).

281. See id. (discussing the incentive to charge cases capitally in order to use death qualification to improve the chances that the jury will convict). States might satisfy this requirement by, for example, forgoing death qualification altogether, empanelling two juries, one (non-death-qualified) to adjudicate guilt or innocence and another (death-qualified) to determine sentence, or empanelling juries with more than 12 non-death-qualified members with the intention of drawing lots to determine who deliberates on guilt, then using the excess jurors to replace any death-scrupled jurors who are removed prior to the sentencing trial. The cost of dual juries would be compensated by reductions in expensive death qualification and other capitally focused jury selection procedures, which would flow from the procedures suggested here.

282. This provision would extend the rule of *Simmons v. South Carolina*, 512 U.S. 154, 169–71 (1994), which currently applies only to life-without-parole states, to states that make parole an option for defendants who are convicted of capital murder but are spared a death sentence. See supra notes 203–209.

283. This provision would preserve the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985), see supra note 210 and accompanying text, but would suspend the rule of *California v. Ramos*, 463 U.S. 992, 1013 (1983), which permits instructions on the availability of executive clemency, see supra note 212 and accompanying text (discussing potentially misleading nature of clemency instructions).

284. Comparative proportionality review requires the reviewing court to evaluate death sentences substantively by (a) discerning and listing the specific, objective criteria that persistently—as well as those that only rarely—lead to capital sentences in the state, (b) carefully scrutinizing whether each death sentence under review is consistent with those criteria and is proportionate to sentences imposed in like cases, and (c) reversing “outlier” sentences. See supra note 261 (discussing similar proposal by Steiker and Steiker).

attorney general using information in the deliberation-period reports described in item (1) above; (c) the trial prosecutor (or someone from her office if she is no longer employed there) must serve as counsel of record and must appear at oral argument; and (d) review must culminate in an opinion documenting the result of the proportionality rule and reporting the names of any defense attorney, prosecutor, or state judge held to be responsible for any error found on appeal, including error deemed harmless or nonprejudicial.²⁸⁵

8. *Meaningful Federal Backup Review on Direct Appeal.* — In any case in which the United States Supreme Court on direct review of a capital judgment discerns a substantial probability of a violation of federal law, it either must exercise its own power to grant certiorari or refer the case to the relevant federal circuit court (which has the power, in turn, to refer fact-based claims to the relevant district court).²⁸⁶

9. *Motions Based on Innocence.* — States must permit the filing of motions for relief from a capital judgment based on newly discovered evidence of (a) innocence or (b) ineligibility for a death sentence at any time while proceedings to review the judgment are permitted and pending.²⁸⁷

10. *Disclosure of Error and Risk Rates.* — For state and national comparative purposes, trial judges and district attorneys must publish and file with the state attorney general and U.S. Department of Justice:

285. For discussion of judges and courts advocating and engaging in such reporting, see Armstrong, *Wayward Prosecutors*, supra note 274 (reporting that “[r]etired Illinois Supreme Court Justice John Nickels, a Republican who served on the state’s highest court as a representative of one of the state’s most conservative judicial districts, . . . testified [in the Illinois House of Representatives] that he favors identifying wayward prosecutors by name in appellate opinions” and “more routinely refer[ring]” prosecutorial and defense counsel misconduct to Illinois’s attorney discipline commission); Armstrong & Mills, *Conviction Overturned*, supra note 138 (noting that after a unanimous Illinois Supreme Court decision overturning the capital conviction of a police killer due to egregious prosecutorial misconduct, the court “took the unusual step of naming the prosecutors and defense attorneys, whom the court . . . criticized for . . . unprofessional behavior,” causing the First Assistant State’s Attorney to acknowledge to the press that “[t]he whole tone of the opinion sends a message about the way trials should proceed”); Armstrong & Possley, *Break Rules*, supra note 137 (noting that “Ruth I. Abrams, a justice on Massachusetts’ highest court, has urged her colleagues to name prosecutors who commit serious misconduct, citing the substantial costs shouldered by taxpayers, victims and others when a case has to be retried”).

286. Cf. Report of the Proceedings of the Judicial Conference Special Session, March 16–17, 1959, 1959 Ann. Rep. Jud. Conf. U.S. 287, 313 (1960) (discussing possibility of improving federal scrutiny of state criminal convictions on direct appeal by empowering the Supreme Court on certiorari to refer petitions “to [federal] district judges sitting as special masters” where factual questions arise). Given uncertainties created by the insufficiency of the record at this stage, a denial of certiorari would not count as a decision on the merits, even of the claims on which certiorari was sought, notwithstanding the Court’s judgment that there was no substantial probability of a violation of federal law.

287. To prevent “sandbagging,” states may require that such motions be filed within some reasonable period after the discovery of the new evidence.

a. the "error rates" (i.e., the rates at which capital judgments secured or presided over by the reporting office or official are overturned on state or federal judicial review of death sentences) of each prosecuting office, lead trial prosecutor, trial judge, and appointed defense lawyer who took part in the proceedings generating those judgments, and the type of error responsible for the reversal;

b. those same actors' "risk rates" (i.e., the rates at which state or federal reviewing courts deem each of the actors' practices unlawful or unethical, or prospectively ban the practice, without reversing the underlying judgment, as where an error is deemed waived, "harmless," or not prejudicial);²⁸⁸ and

c. citations of the judicial opinions and the location of transcripts and other public materials documenting errors, and risky behavior by those same actors.²⁸⁹

288. It is the responsibility of appellate courts, like any other supervisor of a complex system, to detect and take steps to remedy patterns of error and misconduct. Crucial to this effort is the collection of data revealing the error rates associated with each important actor in the system. Because of the disciplining value of published error rates, see *infra* note 292 and accompanying text, the courts should be obliged to report, and can achieve much of the desired remedial effect *simply* by reporting, these rates publicly. Armstrong & Possley describe the quixotic lengths to which individual appellate judges have had to go in the past to compensate for the lack of institutional commitment to curbing, and institutional memory about, repeated instances of prosecutorial misconduct:

In his 18 years on the Illinois Appellate Court [from 1978 to 1996], Dom Rizzi struggled to rein in those prosecutors who trampled upon defendants' rights. And he struggled to get other justices to help.

....

Some lawyers considered Rizzi the court's conscience . . . who was willing, on occasion, to rule by what he thought the law should be, not what it was. Some prosecutors, though, derided him as a lawyer with little experience in the trenches of criminal court.

Over the years, Rizzi tried repeatedly to get prosecutors to try cases fairly.

In some opinions he scolded the prosecution with acid language. In some he mentioned prosecutors by name. During oral argument, he sometimes asked prosecutors to relay the message to their supervisors that the appellate court was getting fed up with certain tactics.

When Rizzi detected a troublesome pattern, he documented it. In one trial, prosecutors said they couldn't provide the defense with tape-recorded police interviews of a witness because they had lost the tape. By a 2-1 vote the court upheld the conviction, but Rizzi dissented and listed 30 other Illinois cases—including 23 in Cook County—where evidence had been lost or improperly destroyed by prosecutors and police.

Armstrong & Possley, *Break Rules*, *supra* note 137.

289. Cf. Dorning, *Safeguards*, *supra* note 279 (describing federal legislation proposed by Vermont Senator Patrick Leahy that would, *inter alia*, give states incentives "to award 'reasonable damages' to prisoners sentenced to death but later found innocent").

Over the last year, both houses of the Illinois Legislature, the Illinois Supreme Court, and, more recently, the Illinois Governor have empaneled committees to consider the frequency with which innocent people have been sentenced to die there and to hold hearings on possible solutions. Among the solutions proposed (with the proponent indicated in parentheses) are many of those suggested in the above text, including that:

These mechanisms have four principal functions. The first is public signaling. The waiting period and decision that follows, as well as the prosecutor's willingness to incur the special procedural costs of proceeding capitally (e.g., more skilled and determined opposition, enhanced discovery, limitations on confessions and testimony by jailhouse informants, and dual jury panels if death-qualification is used), would signal to defense lawyers (and, indeed, to police and prosecutors themselves) that the case is a "real" capital prosecution. The jury instructions and post-verdict polling would signal to jurors that a death verdict is their own "real" responsibility and, where it is the case, that a nondeath verdict results in "real" jail time.²⁹⁰ Prosecutors' capital-charging reports to the

(1) prosecutors be required to notify defense lawyers of their intent to seek the death penalty within 120 days after arraignment of the defendant (supreme court committee; Illinois Senate task force); (2) prosecutors and defense attorneys handling capital cases be limited to members of a special capital litigation trial bar with special experience, training, and ethical standards (supreme court committee; Illinois House Death Penalty task force) or other minimum standards for defense counsel (Senate committee); (3) funding for capital defense be increased (Illinois Attorney General Jim Ryan; Cook County State's Attorney Richard Devine); (4) police be required to videotape confessions and the interrogation leading to them (Illinois Senate task force); (5) prosecutors follow an "open-files policy" in capital cases (Illinois House committee); (6) upon a showing of good cause, defense counsel be permitted to depose certain prosecution witnesses, including jailhouse informants, prior to capital trials (supreme court committee; Illinois House committee); (7) trial judges give instructions cautioning juries about reliance on jailhouse informant testimony (members of and a witness before supreme court committee); (8) trial judges receive enhanced training in the handling of scientific evidence (supreme court committee); (9) appellate courts identify by name prosecutors who engage in misconduct and more frequently refer them to bar disciplinary officials (a former Illinois Supreme Court Justice testifying before House committee); (10) appellate courts automatically reverse convictions upon proof that the prosecutor intentionally withheld exculpatory evidence (a witness before Illinois House committee); and (11) a standing public commission, modeled on one used in Canada, be created to investigate the causes of capital convictions of individuals who turn out to be innocent (a witness before supreme court committee). See Armstrong, *Wayward Prosecutors*, supra note 274; Ken Armstrong & Steve Mills, *String of Exonerations Spurs Legislative, Judicial Panels to Study Reforms*, Chi. Trib., Nov. 16, 1999, at N8; Keith, supra note 276 (discussed supra note 276); Steve Mills & Ken Armstrong, *Prosecutors Under Glare at Reform Hearing*, Chi. Trib., Jan. 28, 2000, at N1; Evan Osnos & David Heinzmann, *Death Penalty Remains an Option, Ryan's Execution Halt Won't Deter Prosecutors*, Chi. Trib., Jan. 31, 2000, at N1; Possley & Armstrong, *Revamp Urged*, supra note 279; see also Dwight Arons, *Getting Out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. Crim. L. & Criminology 1, 2, 64-79 (1998) (proposing variety of reforms similar to some of those advocated here in order "to ensure that only defendants most deserving of death are prosecuted for capital crimes"); Mona Charen, *DNA Tests Can Avert Awful Errors*, Omaha World-Herald, Feb. 16, 2000, at 26 ("The answer must be more care—not more appeals . . . [for example, by] videotaping all interrogations, permitting access to post-conviction DNA evidence and limiting executions to those cases where doubt is pretty much non-existent should calm fears of committing irreversible mistakes.").

290. By increasing the costs, and lowering the number, of capital prosecutions, and by making the imposition of the next-lowest sentence the automatic post-conviction penalty for non-de-minimus violations of the 10 requirements, the proposal would encourage lawmakers to adopt life without parole and other "real time" alternatives to a death

state attorney general, that official's periodic reports to the state supreme court, and that court's comparative proportionality decisions would continuously signal—in the process of continuously revising and updating—the facts that do and do not typically warrant a death sentence in the state, thus helping to unify standards and deter the current geographic disparities in capital sentencing rates that plague many states.²⁹¹ And the continuously peer-reviewed defense lawyer roster, the “error rate” and “risk rate” reports, and appellate judges’ “naming” of offending attorneys and trial judges would inform victims, the public, the media, opposing candidates for public office, and the singled-out individuals and their supervisors about the lawyers, judges, and prosecuting offices in the state that are and are not competently performing their tasks.²⁹²

The reforms’ second principal function is efficient cost allocation—making the relevant actors bear a greater share of the costs of their mistakes in charging and trying cases capitally, so that they more often refrain from making mistakes and thrusting a burden on others to catch and cure them. Here, too, the flow of information is crucial. Under current conditions, prosecutors have strong incentives to hide information at the trial stage, and post-conviction defense lawyers have strong incentives to expend huge amounts of their own, the courts’, and the public’s resources and time searching for that information.²⁹³ Under this proposal, the various pretrial reporting and open-files policies—and, crucially, the provision of defense lawyers skilled in marshaling the disclosed information before and at trial—would help caution prosecutors that their case for death will appear no stronger than it actually is. Consequently, they more often will face the stiff political, reputational, and professional costs of losing at trial²⁹⁴ when that is the deserved outcome. The post-trial reporting, naming, and other feedback mechanisms (e.g., imposition of court costs for adjudicated violations of the ten requirements; the defense counsel registry; and public, media, and supervisory access to statistics and evidence documenting mis- and malfeasance) will add other new costs, which the truncated review process will more quickly and directly impose on the offending actors. As importantly, the absence of most forms of post-conviction review will force capital defense lawyers, via their clients, to bear stiff penalties for back-loading their litigation effort, thus truly forcing them to treat the trial as the “main event.”²⁹⁵

sentence, rather than using early-release sentences as the next-lowest option on the assumption that most or all aggravated killings will receive death. See *supra* note 202 and accompanying text (documenting relationship between enhanced quality of defense lawyers and enhanced use of life without parole options in capital cases).

291. See *supra* notes 114, 140.

292. On the value of error-rate reporting, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 287, 299–301 (1998).

293. See, e.g., *supra* notes 136–162, 192–193, 240–249, 274 and accompanying text.

294. See *supra* note 139 and accompanying text.

295. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

The reforms' third function is to avoid increasing overall costs in the process of rationalizing and reallocating them. Here the crucial reforms are the elimination of all state post-direct-appeal review, the narrowing of federal post-direct-appeal review to one court and to ten claims based on relatively mechanical and objective requirements, and the strict limitation of the time available for that review. The proposal would replace the current four-to-six-court, five-to-fifteen-year state and federal post-conviction review process, which focuses on literally scores of vexing, fact-intensive mixed questions—e.g., whether confessions were voluntary²⁹⁶ and whether there is a reasonable probability that but for prosecutorial misconduct, attorney error, or jury misinstruction, the outcome of trial would have been different²⁹⁷—with a single federal court's eight-to-twelve-month inquiry, which would focus on whether and when particular reports were filed, and whether the ten well-specified procedures listed above were followed.²⁹⁸ Although certain questions would require judg-

296. See *supra* note 151 and accompanying text.

297. See, e.g., *Boyde v. California*, 494 U.S. 370, 380 (1990) (premising finding of instructional error on question whether there is a reasonable probability that the challenged instruction misled the jury); *United States v. Bagley*, 473 U.S. 667, 669 (1985) (basing suppression of evidence violations in part on whether there is a reasonable probability that but for the government's suppression of evidence, the outcome of the trial would have been different); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (premising ineffective assistance of counsel on whether the defense attorney's performance was unreasonable and, if so, whether there is a reasonable probability that, but for the deficient performance, the outcome of trial would have been different).

298. The "well-specified" qualifier is meant to encourage the federal court inquiry to focus on questions about procedures as to which a simple "yes" or "no" answer will usually be possible, e.g., videotaping of confessions, notice of aggravating circumstances, appointment of lawyers off of a specified list and compensation of them at a specified rate, disclosure of the prosecutor's file, confinement of death qualification *voir dire* to the sentencing phase, and use of specified instructions. The qualifier accordingly calls upon the drafters of relevant legislation to make requirements as straightforward as possible.

The fact that requirements are straightforward will not assure that they will be seen as more than "merely technical"; indeed, it may have the opposite effect. The question remains, therefore, whether the contemplated system will be capable of bearing the strain of controversial reversals that occur because the state violated a "technical" rule, for example, by failing to give the required notice to a victim consulted at the charging stage. That strain is limited in three ways. First, the state's "declaration" at the time of opting-in, see *supra* note 267 and accompanying text, will have made clear that the state self-consciously undertook to perform the relevant formalities for sound reasons of public policy. The declaration thus will provide some of the explanation for the reversal and enable the reversing court more effectively to share the onus of the reversal with the state. Second, because the requirements are straightforward, violations should be relatively rare, and blame will be easy to assign. Third, the cost of a violation will be limited in ways described in the text following this footnote. All of this, of course, is simply to emphasize the contractual nature of the states' decision to "opt-in." States can, of course, decline to opt in and either be satisfied with the pre-existing system of weak trials but strong review mechanisms—or, more likely—undertake their own reforms that avoid the "technical" costs of the proposed system and achieve some or all of that system's benefits (and perhaps others) while still providing enough due process to satisfy ongoing federal habeas corpus scrutiny on a case-by-case basis. One such reform might be to: (1) abandon state post-

ment—e.g., the sufficiency of a state's alternatives-to-death instruction and its comparative proportionality review—that judgment could often be made once for all cases in each state, in a single, lead decision. Thereafter, questions would arise only upon a state's substantial change in its routine procedure or substantial deviation from the procedure in a particular case. In most cases, the relevant record would consist of a docket sheet, a series of appended reports and requisitions, a procedural checklist, and a direct appeal decision. Most importantly, perhaps, the result of finding a violation would not be a second trial and a second multi-court, multi-year review process but, instead, automatic imposition of a life sentence and of litigation and adjudication costs on the wrongdoing agency—in addition to the various “naming and shaming” and related reporting remedies.

The proposed regime is one to which states would have the choice to opt into—or not. Although partly designed to forestall Tenth Amendment objections,²⁹⁹ this attribute serves a fourth and final function. It would poignantly raise a question that each state would be impelled to address systematically at all levels, local and statewide, and in a variety of public forums up to and including the state's legislature and supreme court: What kind of capital punishment system—if any—does the state need and want, given the costs? Asking this question does not require the states to give a particular answer. Some states might conclude that they need a system of capital punishment as part of their criminal justice arsenal, but that they can improve the existing system by either opting into the proposed reform or designing their own.³⁰⁰ Other states might decide to maintain the existing system, in which case those states could stand pat with the system described in Part II above, and stop complaining. Still other states might find that, when push comes to shove, they do not rationally require a capital sentencing regime, given how expensive it is and how few cases it affects; they could suspend or abolish the punishment.

CONCLUSION

Procedure affects substance, in capital punishment as elsewhere. But the relationship is complex. Although there is considerable support for the long-assumed trade-off of enhanced capital procedures against reduced executions, and vice versa, the hollowing out of capital procedures at the trial level does not very effectively serve the state's substantive goal

conviction review altogether, (2) shift the saved resources to improved capital trials, and (3) leave the kinds of claims typically resolved in state post-conviction proceedings (mainly, ineffective assistance of counsel and prosecutorial suppression of evidence) to federal habeas corpus proceedings in which the “exhaustion of state remedies” requirement is waived.

299. See, e.g., *Printz v. United States*, 521 U.S. 898, 918–20 (1997); *New York v. United States*, 505 U.S. 144, 155–56, 187–88 (1992).

300. See *supra* note 298.

of subjecting the deserving, and only the deserving, to the death penalty. Conversely, the bloated capital procedures that currently characterize the post-trial level have become crucial to the achievement of the state's substantive capital punishment goal of deciding who, justifiably, should live and who should die. That our existing capital system hollows-out trial level procedures, with adverse substantive consequences, then bloats post-trial procedures, with favorable substantive effects, does not, however, mean that the system successfully accommodates procedure and substance, or even that it operates with a scintilla of rationality. Quite the contrary. In operating in this fashion, the system gives trial-level officials a political-capital machine that is as inexhaustible and costless for them—and as conducive to the kinds and quantities of serious error on which their anti-death-penalty opponents thrive at the post-trial level—as it is irrational and expensive for everyone else, including taxpayers, victims, appellate courts, state-level officials, and the incessant trickle of wrongly condemned men and women.

More particularly, by parceling out substantial political and other rewards to trial-level officials on a strictly per-death-sentence basis, while enabling them to displace the costs of faulty death sentences onto others, the current death penalty system encourages those officials to generate as many death verdicts as they can, even in marginal or inappropriate cases, often through corner-cutting and manipulation. This, in turn, increases the likelihood of faulty verdicts whose costs others—wrongly condemned defendants, frustrated victims of crime, appellate courts, and taxpayers throughout the state—must bear. At the same time, by inflating the number of capital cases at the trial level, while requiring an elaborate appeals process to catch the flaws that infect many capital verdicts, the system encourages anti-death penalty lawyers to neglect trials and concentrate on post-trial representation that benefits them and their clients (and also, ironically, their pro-death penalty antagonists³⁰¹) but imposes huge costs on the public. Diverting defense resources from trial, in turn, facilitates official corner-cutting and manipulation, inducing more faulty death sentences, further drawing anti-death penalty lawyers to the easy pickings at the post-trial stage, and imposing higher public costs. Finally, by simultaneously benefiting trial-focused pro-death penalty officials and appellate-focused anti-death penalty lawyers, the system assures that its trustees and watchdogs are opposed to serious change.

301. Death penalty supporters often point to high reversal rates as proof that the review system "works" to catch error. See, e.g., Frank Davies, *Two-Thirds of Death Sentences Derailed, Study Finds Court System Nationwide Saddled with Weight of its Own Mistakes*, *The Record* (Northern New Jersey), June 12, 2000, at 1 (quoting "a spokesman for Gov. Jeb Bush of Florida, who supports the death penalty, [saying that] high error rates [in American death verdicts] show that 'an extensive appeals procedure, with adequate due process, works in reviewing cases'"); *supra* note 238. The senselessness of jury-rigging an error-generating machine at the trial level to an error-detecting machine on appeal—and the riskiness of using procedurally focused error-detection mechanisms to catch the substantive mistakes that capital trials often produce—shows the system does not "work."

For these reasons, the solution to the current death penalty crisis is not a commitment to more or fewer procedures, or to different substantive goals. The solution is a comprehensive overhaul of the procedures we have that realigns the relevant actors' incentives and leads, in a cost-effective way, to the achievement of existing substantive goals. Toward that end, this Article outlines a ten-point plan for (1) narrowing the range of cases that are charged capitally, (2) carefully testing capital charges at trial, and (3) narrowing post-trial review of the fewer and more reliable capital sentences that result.

Imagining a reformed system is easy. Securing its adoption is not. The reason is suggested by a question at the beginning of this Article: Who chose this system? The problem is that *no one* chose it. For years, no one (or ones) with a capacity to envision and rationally "choose" a system of imposing and reviewing capital sentences *as a whole*—irrespective of the part of the system that is closest to home—has paid attention to the system we actually have.³⁰² As a result, trial-level officials have been free to turn their part of the system into a machine for generating political capital on a *per-death-sentence* basis, with the inevitable byproduct of enough error to fuel the anti-death penalty bar's equally potent machine for generating post-trial capital on a *per-reversal* basis. Because those actors are unlikely to move separately or together to shut down mechanisms that, in tandem, are a perpetual motion machine for benefiting each of them, the crucial question is whether policymakers with a broader perspective or the public at large will move to reclaim control and choose a different system. The traditional collective action story suggests they will not.³⁰³ The currently unfolding story of bipartisan discontent with the existing system suggests they might.³⁰⁴ The aim of this Article is to foster the choice by fomenting the discontent.

302. Several reasons for this inattention come to mind: (1) It does not seem possible to take on the capital system without taking on the entire criminal justice system—an unattractive reform target, given its size and centrality—because the significance of differences between the systems, such as less frequent plea bargaining and more frequent appeals in capital cases, is easy to miss. (2) The constituencies with a deep interest in the capital system's overall rationality—criminal defendants and relatives of murder victims—lack political power and have to rely on surrogates who benefit from the system's problems. (3) Other collective action problems enable those same opposed sets of surrogates, each of which is cohesive and has a strong interest in the current system, to out maneuver the larger and less cohesive body of citizens who have individually weaker (if collectively more powerful) interests in the system. (4) The deep-seated and unresolvable moral differences that underlie the capital punishment debate dispose citizens to trust surrogates who share their beliefs, irrespective of conflicting interests, and to dismiss those who raise alarms as motivated by incompatible beliefs, or to despair of reform in the absence of unattainable moral agreement. (5) The Supreme Court's treatment of the death penalty as an insular matter of constitutional law has encouraged policymakers to cede the issue to the courts.

303. See *supra* note 302.

304. See *supra* notes 248–264 and accompanying text.